

# The Constitution's Peoples:

A Robust and Group-Centred Interpretation of Section 35  
of the *Constitution Act, 1982*, In Light of *R. v. Powley*

by

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B. Com., University of British Columbia, 1995  
LL.B., McGill University, 2000

A Thesis Submitted in Partial Fulfilment of the  
Requirements for the Degree of

MASTER OF LAWS

in the Faculty of Law

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University of Victoria

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## ABSTRACT

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Since 1982, the Canadian Constitution has “recognized and affirmed” the Aboriginal and treaty rights of “the Indian, Inuit, and Métis peoples of Canada”, peoples that hold their unique status within the federation by virtue of their prior social organisation. The author argues that, when Aboriginal rights are invoked, analysis should focus on the community in which the right is said to reside. Contemporary rights-holding communities are those linked to the normative orders that preceded and survived those of the later arrivals: in this regard, the Métis are not dissimilar from the other recognised Aboriginal peoples. It is the community’s capacity to determine the norms applicable to its members’ lives that is important, not the actual content of that order at a particular time: Aboriginal societies must be afforded the latitude to pursue their own aims and ambitions, and their rights must not be limited to activities that appear objectively “Aboriginal”.

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## ACKNOWLEDGEMENTS

I wish to provide thanks to my co-supervisors, Professors Paul Chartrand and Jeremy Webber, for their assistance and detailed comments on successive working drafts of this thesis. I also owe particular debts of thanks to: the Social Sciences and Humanities Research Council of Canada, the University of Victoria's Faculty of Law, the benefactors of the Edwin Botsford Busteed Scholarship, and the Office of the University of Victoria's President for the generous financial assistance provided by each; Professor John Borrows (University of Victoria, Faculty of Law) for the gift of his comments on elements of the thesis; Professor Chris Andersen (University of Alberta, School of Native Studies) for his great help not only in collecting the *facta* and Expert Reports in the *Powley* case, but also in the sharing of his doctoral dissertation; those responsible for the administration of the University of Victoria's Graduate Programme in Law, in particular Professor John McLaren and Elizabeth Wheaton for their tireless commitment to, and work on behalf of, the students; Professors David Lametti and G. Blaine Baker (McGill University's Faculty of Law), and the Honourable Frank Iacobucci in their roles as referees for my application for graduate studies; and my wife Sonia Han and son Emmett Connor Han Olthuis for their support and patience at home during the long work that went in to this product.

*To "Grannie"*  
*(Winnie (Prins) Olthuis)*

## I. Background

By his own account, Steve Powley only began to identify as a Métis person late in life. His 1948 birth certificate listed his parents' "Racial Origins" as Irish and English.<sup>1</sup> He grew up in Sault Ste. Marie, Ontario, thinking himself to be "a white man," his mother having told him that her family "had just a tiny bit of native blood."<sup>2</sup> It was only long after his mother's death that, through a cousin, Powley learnt further details about his maternal ancestry and started to self-identify as Métis.<sup>3</sup> In 1990, Steve Powley applied for membership in the Ontario Métis and Aboriginal Association ("OMAA").<sup>4</sup> OMAA approved the application and issued Powley an identification card.

On the morning of 22 October 1993, Powley went hunting with his son, Roddy, just north of Sault Ste. Marie. They shot and killed a bull moose. Neither of the Powleys

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<sup>1</sup> Mr. Powley's birth certificate was filed as Tab 27 to Exhibit 48 at his trial (indexed as "Black Binder—Ms. Armstrong"), in support of the expert opinion of the defence genealogical witness, Heather Jean Armstrong. What is more, although Mr. Powley ultimately came to know of Aboriginal ancestry on the side of his mother, Alberta Marie Micks, her birth certificate also indicated both parents as "white." See *Powley Trial Exhibit 48*, Tab 25; see also *R. v. S. Powley and R.C. Powley*, Trial Transcript ("*Powley Transcript*"), vol. 4 (8 May 1998) at 145, 156-60 (Heather Jean Armstrong cross-examination).

<sup>2</sup> Tonda Maccharales, "Métis rights on hunting challenged in top court" *Toronto Star* (17 March 2003) A10.

<sup>3</sup> In an interview granted before his case was heard in the Supreme Court, Steve Powley stated, "I was a white man right up to a few years ago. My mother would not admit she was native." (*Ibid.*)

<sup>4</sup> This body was founded in 1971 under the name Ontario Métis and Non-Status Indian Association ("OMNSIA"), as a coalition bringing together existing community-based local associations of persons identifying either as Métis or as Indians not registered or registrable under the federal *Indian Act* (then R.S.C. 1970, c. I-6, now R.S.C. 1985, c. I-5): *i.e.* "non-Status" Indians. Following the proclamation of *An Act to amend the Indian Act* ("Bill C-31"), S.C. 1985, c. 27 (reprinted in R.S.C. 1985, c. 32 (1st Supp.)), the organisation expanded its mandate in 1987 to include all off-reserve Aboriginal persons, whether Métis, Status Indians, or non-Status Indians, and changed its name to the Ontario Métis and Aboriginal Association. (Some time after 1993, it dropped the "and".) Since its inception, OMAA has been affiliated with the Native Council of Canada ("NCC") and its successor, the Congress of Aboriginal Peoples ("CAP"). See: "OMAA's Mission, Vision and History", online: Ontario Métis Aboriginal Association <[http://www.oma.org/page\\_1\\_OMAAS\\_history\\_mission\\_vision.htm](http://www.oma.org/page_1_OMAAS_history_mission_vision.htm)> (date accessed: 30 March 2005); and "Ontario Métis and Aboriginal Association", online: Congress of Aboriginal Peoples <<http://www.abo-peoples.org/affiliates/oma.html>> (date accessed: 30 March 2005). See also: *Powley Transcript*, vol. 1 (27 April 1998) at 26-126 (Anthony Belcourt examination-in-chief). It is convenient to state here that, in accordance with the current usage favoured by the groups themselves, I use the general reference "First Nation" throughout this thesis to replace "Indian," except where citing from authorities and organisations in which the older usage appears. The same goes, respectively, with "Inuit" and "Eskimo."

held a licence or other form of approval from the provincial Ministry of Natural Resources. Instead, Steve Powley affixed a hand-written tag to the moose's ear, detailing the date, time, and location of the kill, and noting that he had shot the animal in order to harvest meat for the winter. He wrote his OMAA card number on the tag.<sup>5</sup>

At the time, Ontario's official Interim Enforcement Policy ("IEP") instructed that provincial hunting laws and regulations "continue[d] to apply in respect of harvest of wildlife ... by Métis and non-Status Indian people."<sup>6</sup> Apparently aware of this, but fed up with an effective denial of his Métis hunting rights, Powley decided on this occasion to take the moose carcass home in plain view. Later that afternoon, two Conservation Officers arrived at the Powley home.<sup>7</sup> The Powleys admitted they had been hunting without a licence and that they did not have a bull moose tag. The Powleys also offered

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<sup>5</sup> The tag was appended to *Powley* Trial Exhibit 1 (indexed as "Agreed Statement of Facts"). See also *R. v. Powley* (1998), 58 C.R.R. (2d) 149, [1999] 1 C.N.L.R. 153 (Ont. Ct. J. (Prov. Div.)) at paras. 3-5 [hereinafter *Powley* (Prov. Div.)].

<sup>6</sup> *Powley* Trial Exhibit 15. Ontario created the IEP in response to the judgment in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.], and provided it to Conservation Officers and other officials in the Ministry of Natural Resources. The IEP specified that the province would not enforce hunting and fishing laws against Status Indians harvesting or transporting wildlife or fish for personal consumption and/or for social and ceremonial purposes. It would continue to enforce these laws against Métis and non-status Indians "unless or until agreements have been entered into with Métis and non-status Indian communities providing for such harvest." In December 1995 (in a judgment that was ultimately overturned on appeal), Cosgrove J. found the IEP to be unconstitutional: *R. v. Perry* (1995), [1996] 2 C.N.L.R. 161, [1995] O.J. No. 4228 (QL) (Gen. Div.), rev'd (*sub nom. Perry v. Ontario*) (1997), 33 O.R. (3d) 705, 100 O.A.C. 370, leave to appeal to S.C.C. refused (*sub nom. Perry v. The Queen*) [1997] 3 S.C.R. xii. As a result, Ontario made a brief attempt to rescind the IEP and, in its place, issue a policy entitled "Aboriginal Compliance Guidelines."

<sup>7</sup> Steve Powley passed away on 23 February 2004. Two days later, in an interview on CBC radio, his legal counsel Jean Teillet reminisced:

[Steve] and his son Roddy went hunting and really the genesis of the case is that Steve stood up for the first time in his life and decided to bring his [winter meat] home in the daylight. It's sort of a reflection of, really the way many Aboriginal people live in this country, is that they practise their customs and traditions in secret. And so Steve decided he had enough of that and that he was going to bring his winter meat home right in the daylight which he did and someone, one of his neighbours promptly called Crime Stoppers on him. And thus began what I call the Métis Hunt for Justice...

A transcript of the interview is available on the Métis Nation of Ontario website <[http://www.metisnation.org/news/04\\_MAR\\_StevePowley\\_Jean\\_Interview.html](http://www.metisnation.org/news/04_MAR_StevePowley_Jean_Interview.html)> (date accessed: 30 March 2005).

that they were not, and that they never had been, registered under the *Indian Act*. The Officers seized a rifle and the moose carcass, and one week later charged the Powleys with violations of the provincial *Game and Fish Act*.<sup>8</sup>

In the meantime, a number of Métis persons active in OMAA split with that group to form the Métis Nation of Ontario (“MNO”), which subsequently achieved member organisation status under of the Métis National Council (“MNC”).<sup>9</sup> Steve Powley, as many others in like circumstances, resigned his membership in OMAA and joined the new entity.<sup>10</sup>

In April 1995, after a number of adjournments of the trial (during which, the record suggests, the Powleys—then represented by local counsel—made some attempt to negotiate with the Crown<sup>11</sup> towards a settlement of the charges), the MNO sought leave to intervene in the Powleys’ case. It was at this stage as well that then defence counsel first

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<sup>8</sup> R.S.O. 1990, c. G.1, ss. 46, 47(1), as rep. by S.O. 1997, c. 41, ss. 119 (1), 127. Respectively, the provisions read: “No person shall knowingly possess any game hunted in contravention of this Act or regulations,” and “Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose.”

<sup>9</sup> In 1983, prior to the first constitutional conference on Aboriginal issues, the representative bodies of the Métis in the Prairie provinces withdrew from the NCC and formed the MNC, to represent better the issues concerning the Métis Nation. The Métis in Ontario, however, remained with OMAA. A change occurred in 1991, when, motivated by a similar desire to focus on issues germane to the Métis people, Métis advocates within OMAA formed the Métis Commission of Ontario (“MCO”) as a sub-group under that organisation. At first, the MCO was granted observer status within the MNC. When OMAA ran into serious financial difficulties in autumn 1993, the members of the MCO decided to incorporate as a separate entity, the MNO. The MNO held a Founding Delegates’ Assembly in May 1994, and later became a full (and the only Ontario-based) member of the MNC. See *Powley Transcript*, vol. 1 (27 April 1998) at 101-15 (Belcourt examination-in-chief).

<sup>10</sup> Steve Powley is quoted in a June 2001 article in the *Métis Voyageur* journal as saying that he had unequivocally resigned his membership in OMAA eight years earlier: see online: Métis Nation of Ontario <<http://www.metisnation.org/harvesting/Powley/voyageur01j.html>> (date accessed: 30 March 2005).

<sup>11</sup> At law, the term “Crown” can refer to many different entities. In the context of the *Powley* case, it refers to the Province of Ontario (or “Her Majesty the Queen in Right of Ontario”), the prosecuting body. I might have used “Ontario” in place of “Crown,” but opted for the latter for its emphasis on the special relationship between Aboriginal peoples and those prosecuting them (implicated in notions such as “the Honour of the Crown” and the fiduciary duties of the Crown). As well, this accords with the common practice in which lawyers conducting prosecutions on behalf of government (provincial or federal) are called “Crown counsel.”

served a Notice of Constitutional Question, indicating the Powleys' challenge to the operation of the Ontario legislation. By the summer of 1995, the Powleys had switched lawyers, and were being represented by counsel for the MNO.<sup>12</sup> Owing to subsequent Crown personnel changes and requests for adjournments, the trial did not commence until 27 April 1998, four and one-half years after charges were laid.<sup>13</sup>

When the trial finally began, the Powleys admitted the underlying facts alleged by the Crown, and the only issues to be decided were constitutional ones. Were the Powleys Métis within the meaning of s. 35(2) of the *Constitution Act, 1982*?<sup>14</sup> If so, did they have existing rights under s. 35(1)<sup>15</sup> that were unjustifiably infringed by the operative provisions of the *Game and Fish Act*, to render the legislation of no force or effect?

The Powleys called seven witnesses: Tony Belcourt, the President of the MNO; Art Bennett, a member of the Sault Ste. Marie Métis community and Steve Powley's first cousin; William "Jack" Bouchard, a local Métis hunter; Dr. Arthur Ray, a Professor of History and expert in the economic history of the Upper Great Lakes area prior to 1860;

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<sup>12</sup> *Powley* (Prov. Div.), *supra* note 5 at para. 137. The MNO ultimately participated only indirectly in the trial, through the provision of "financial and moral assistance" to Steve Powley: see *Métis Voyageur*, *supra* note 10. OMAA had no participation whatsoever until it intervened at the Court of Appeal level.

<sup>13</sup> Both the trial judge and a pre-trial hearing judge intimated that the Powleys had a strong argument for a stay of charges, pursuant to ss. 11(b) and 24(1) of the *Canadian Charter of Rights and Freedoms* ("Charter"), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 and *R. v. Askov*, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355: see *Powley* (Prov. Div.), *ibid.* at paras. 137-40. Rather than seeking a judicial stay of charges, however, counsel for the Powleys repeatedly fought to bring the matter to trial as expeditiously as possible, for determination on its merits as a "test case." In the portion of his reasons dealing with s. 11(b) (para. 141), Vaillancourt Prov. Ct. J. expressed some discomfort with the state of affairs:

I understand counsels' enthusiasm to expand the legal landscape. However, a the [*sic*] desire to create new jurisprudence should take second place to the best interests of the accused. This comment must be tempered in this particular case by the fact that, in my opinion, the Powleys were willing participants in the quest for a ruling on the merits.

<sup>14</sup> *Constitution Act, 1982*, *ibid.* Sub-section 35(2) reads: "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

<sup>15</sup> *Ibid.* Sub-section 35(1) states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Dr. Victor Lytwyn, a consultant and expert in identifying and tracking Aboriginal peoples in the Great Lakes region and describing their resource use; Heather Jean Armstrong, a genealogical researcher specialising in the ancestry of Aboriginal persons; and Olaf Bjornaa, a local Métis fisherman. Neither Steve nor Roddy Powley testified.

Steve Powley's decision not to testify was surely influenced by the precipitous decline in his health throughout the saga.<sup>16</sup> It is less clear why Roddy Powley did not take the stand. At least one Métis scholar has suggested that the Powleys' counsel may also have been "worried that neither [Steve] nor [Roddy] would hold up well" under cross-examination, owing to their relatively recent self-identification as Métis persons.<sup>17</sup> Whatever the reasons for the Powleys' not taking the stand as part of their case, the trial judge agreed with Crown counsel that it amounted to "a very significant omission" that deprived the court of the opportunities to hear the Powleys' accounts of their historical roots in the Métis community and "to assess how the Powleys interact within the [contemporary] Metis community of the Sault Ste Marie area."<sup>18</sup>

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<sup>16</sup> Powley suffered two heart attacks between the laying of charges and trial, and he was in fact too unhealthy to attend much of the trial: see *Powley* Transcript, vol. 1 (27 April 1998) at 22-23 (defence opening statement). Owing to complications from diabetes, doctors amputated one of Powley's legs prior to the Court of Appeal for Ontario's ruling in his case, and in the end, tragically, he lost his battle with diabetes only five months after the Supreme Court's ruling, passing away at the age of 56: see *supra* note 7.

<sup>17</sup> Christian Andersen, *Courting Colonialism? The Juridical Construction and Political Aftermath of Métis Rights in R. v. Powley* (Ph.D. Thesis, University of Alberta 2004) [unpublished, on file with the author] at 8, n. 10.

<sup>18</sup> *Powley* (Prov. Div.), *supra* note 5 at paras. 62-63. See also *R. v. Powley* (2001), 53 O.R. (3d) 35, 196 D.L.R. (4th) 221 at paras. 143, 149 (C.A.) [hereinafter *Powley* (C.A.)]. Normally, in a criminal trial, it is impermissible to consider an accused person's decision not to testify: *R. v. Noble*, [1997] 1 S.C.R. 874, 146 D.L.R. (4th) 385 (*per* Sopinka J.); *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 4(6). The *Powley* case was different in three respects. First, it concerned an Ontario penal statute, and was thus subject to the *Evidence Act*, R.S.O. 1990, c. E.23 (with no equivalent to s. 4(6) of the federal Act). Second, despite not testifying, the Powleys did not stand on their silence: they agreed to the facts of the would-be offence by way of an Agreed Statement of Facts. Finally, after the offence itself is made out, it is the claimant who bears the burden of proving that he or she (or *it*: see *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528 at para. 15 (*per* Lamer C.J.C.)) has a defence to the charge flowing from an Aboriginal right—failing to lead evidence capable of meeting this onus will be fatal to the defence.

After a two month adjournment,<sup>19</sup> the Crown responded with its own historical expert, Gwynneth Jones, and an expert in forest wildlife ecology, Scott Jones.

On 21 December 1998, Vaillancourt Prov. Ct. J. decided the constitutional issues in favour of the Powleys, and dismissed the charges against them. The first substantive issue he addressed was whether the Powleys were Métis persons for the purposes of s. 35(2) of the *Constitution Act, 1982*. By way of background on this point, he stated:

An overview of the evidence adduced at trial and an examination of the case law demonstrate that there are several factors that impact on the identification issue. Historically, there were distinct circumstances across Canada that resulted in different communities developing from the mixing of European and Indian groups. Government intervention such as the *Indian Act* have [*sic*] defined some individuals as Indians who might normally be classified as Metis. The political differences between groups representing the Metis landscape and claiming to represent the “real Metis” have created a divided approach to a complicated identity issue.<sup>20</sup>

Vaillancourt Prov. Ct. J. proposed a two-part process to determine Métis “status” under the Constitution. “The first part of the process involves the self identification of the Powleys as Metis and the acceptance of them into contemporary Metis society.”<sup>21</sup> These criteria were met in the case, as Steve Powley’s conduct demonstrated his identification as a Métis person and his memberships in OMAA and the MNO showed acceptance by two organisations representing contemporary Métis society. “The second part of the process for the Powleys is to demonstrate that there is a genealogical connection between themselves and the historically identified Metis society.”<sup>22</sup> Although Judge Vaillancourt

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<sup>19</sup> When, mid-trial, the Crown requested this adjournment, defence counsel strenuously objected: see *Powley* Transcript, vol. 1 (29 April 1998) at 266-76, 354-66. She then requested, but was not granted, an order from the court preventing the laying of any charges against other Métis hunters until the court had delivered its ruling on the constitutional issues: see *Powley* Transcript, vol. 2 (1 May 1998) at 271-87, and Vaillancourt Prov. Ct. J.’s 4 August 1998 reasons for dismissing the motion, reported as *R. v. Powley*, [1998] O.J. No. 3296 (QL) (Ont. Ct. J. (Prov. Div.)).

<sup>20</sup> *Powley* (Prov. Div.), *supra* note 5 at para. 43. See also discussion below at 22-25.

<sup>21</sup> *Ibid.* at para. 65.

<sup>22</sup> *Ibid.* at para. 66.

found that one would have to go back a full six generations in the case of Steve Powley—and seven in that of Roddy—to find a “full-blood” Aboriginal ancestor,<sup>23</sup> he held that the defence had proven the Powleys’ “Aboriginal roots.”<sup>24</sup>

At this point, the trial judge turned to the matter of the historic Métis society. In this connection, he took from the evidence that the arrival of French fur traders in the Sault Ste. Marie area in the mid-17th century “soon led to marriages between the Ojibway women in the area with the traders. The resultant family groups of mixed-blood families evolved into a new group of Aboriginal people, now known as the Metis.”<sup>25</sup> This new people was visually, culturally, and ethnically distinct from the peoples from which it had sprung.<sup>26</sup> After the conclusion of the Robinson-Huron Treaty in 1850, the Sault Ste. Marie Métis waned in visibility, and they became a “forgotten people,” an invisible entity within the general population.<sup>27</sup>

As for the existence of a contemporary Métis society in Sault Ste. Marie, Vaillancourt Prov. Ct. J. emphasised the testimony of two defence witnesses as to the prejudice and ostracism they felt from both First Nations and non-Aboriginal society. The sense of otherness engendered by these circumstances supported the argument that there was a distinct community of Métis persons in the region.

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<sup>23</sup> In actual fact, Judge Vaillancourt posed it this way: “In the case at bar, Mr. Steve Powley has 1/64 Aboriginal blood and his son, Roddy has 1/128.” (*Ibid.* at para. 46.)

<sup>24</sup> *Ibid.* at para. 66.

<sup>25</sup> *Ibid.* at para. 75.

<sup>26</sup> *Ibid.* at paras. 76, 77. For this conclusion, Judge Vaillancourt relied upon Jacqueline Peterson, “Many roads to Red River: Métis genesis in the Great Lakes region, 1680-1815” in Peterson & J.S.H. Brown, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) 37 (filed as *Powley* Trial Exhibit 31, supporting documents for defence expert Dr. Arthur Ray (indexed as “Two black binders”)), and Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Communication Group, 1996) [hereinafter *RCAP Perspectives and Realities*], c. 5 (filed as *Powley* Trial Exhibit 21 (indexed as “Photocopy of Chapter 5 of Royal Commission Report”)).

<sup>27</sup> *Powley* (Prov. Div.), *ibid.* at paras. 78, 80.

Judge Vaillancourt modified the test from *R. v. Van der Peet*,<sup>28</sup> as concerns the relevant time frame for determining the existence of the Aboriginal right. Insofar as the Métis people emerged from contact between the First Nations and Europeans, it was appropriate to look at the time of “effective European control,” rather than contact, as the time appropriate for determining whether the right claimed links to a practice, custom or tradition that was integral to a distinctive Aboriginal culture.<sup>29</sup> In this case, that date was to be found “[s]ometime between 1815 and 1850.”<sup>30</sup>

In the final analysis, the trial judge found that the Powleys were claiming a right to hunt for food.<sup>31</sup> Hunting was an integral part of the distinctive culture of the Sault Ste. Marie Métis prior to the assertion of effective control by the Europeans.<sup>32</sup> Documentary

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<sup>28</sup> [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [hereinafter *Van der Peet*].

<sup>29</sup> *Powley* (Prov. Div.), *supra* note 5 at paras. 84-91. Defence counsel argued during closing arguments that this date represented the appropriate “time for examining the distinctive Métis society” (Powleys’ Trial Factum, para. 57). The notion of effective European control was adopted from *R. v. Adams*, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657 at para. 46, in which Lamer C.J.C. employed it in lieu of the stricter “contact” time frame he had posited just six weeks earlier in *Van der Peet*, *ibid.* at paras. 60-67.

<sup>30</sup> *Powley* (Prov. Div.), *ibid.* at para. 90. This factual finding was not challenged on appeal but, interestingly, there was no direct evidence presented at trial on the point. Again, it was during closing arguments that defence counsel suggested: “The evidence shows that the time of effective control in this area is at the earliest 1815 and at the latest 1850” (*Powley* Transcript, vol. 6 (8 September 1998) at 57 (Defence counsel submissions)). Judge Vaillancourt specifically cited Dr. Ray’s evidence in support of his adopting the 1815 to 1850 span, but Dr. Ray actually referred to 1815 as the absolutely latest date for the emergence of a distinct Métis community in Sault Ste. Marie (this occurred, he said, between 1760 and 1815), which has no bearing on the issue of European control. In respect of the later limit, Dr. Ray in fact opined that the traditional Aboriginal economies were not significantly altered even into the 1860s, despite the arrival of mining development in 1846 and the conclusion of the Robinson Treaties in 1850 (*ibid.*, vol. 2 (1 May 1998) at 258 (Ray examination-in-chief) and (4 May 1998) at 307 (Ray cross-examination)). To similar effect was the perspective expressed by Métis person John Driver, recounting his recollections for the Borron Commission in the 1890s (quoted in the Crown witness Gwynneth Jones’s Expert Report (*Powley* Trial Exhibit 55 (indexed as “Black binder – report of Ms. Jones”) at 17)):

Fifteen years after the Robinson Treaty...some time in 1856 when the Magistrates and lawyers came and they [the Métis] found themselves subject to the laws of the white men which they were not accustomed to and had to lay their claim before the Crown Lands Department they sold their improvements [*sic*] and left the place some went to Garden River Indian Reserve, some down about Bruce Mines and Thessalon River and all along the north shore of Lake Huron there is five or six families still living in the town the first of the old stock.

<sup>31</sup> *Ibid.* at para. 92.

<sup>32</sup> *Ibid.* at para. 104.

evidence filed at trial showed that Métis individuals continued hunting in the late-19th century.<sup>33</sup> Moreover, two witnesses from the contemporary community provided direct evidence of hunting's continued importance as an aspect of Sault Ste. Marie Métis life.<sup>34</sup> There was no evidence to suggest that the Métis hunting rights had been extinguished,<sup>35</sup> and the operative provisions of the *Game and Fish Act* unjustifiably infringed the Powleys' rights under s. 35(1).<sup>36</sup> Judge Vaillancourt therefore dismissed the charges against Steve and Roddy Powley.<sup>37</sup>

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The *Powley* case broaches some of the most difficult—and most fundamental—issues with respect to the interpretation of s. 35 of the *Constitution Act, 1982*. Since 1982, a developing body of jurisprudence set out a framework for analysing s. 35(1) claims and defined the rights protected thereby.<sup>38</sup> Rather incongruously, though, there was no real consideration of which precise groups are captured in the constitutional phrase “the Indian, Inuit and Métis peoples of Canada.”<sup>39</sup> That is, while the courts articulated ostensible justifications for—and legal tests applicable to—Aboriginal and treaty rights, there were no parameters set for determining whether a group fell within s. 35(2) or whether a given individual was a member of a rights-bearing community.

My interest in these issues first arose following the *Powley* decision of the Court of

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<sup>33</sup> *Ibid.* at para. 105, citing employment information recorded in census reports filed as part of *Powley* Trial Exhibit 40 (indexed as “Large black binder of documents”) and hunting infractions reported in *Powley* Trial Exhibit 57 (indexed as “Ontario Sessional Reports”).

<sup>34</sup> *Ibid.* at para. 106, citing *Powley* Transcript, vol. 1 (29 April 1998) at 302-03 (Art Bennett examination-in-chief) and vol. 4 (8 May 1998) at 189, 191 (Olaf Bjornaa examination-in-chief).

<sup>35</sup> *Ibid.* at para. 108.

<sup>36</sup> *Ibid.* at para. 129.

<sup>37</sup> *Ibid.* at para. 130.

<sup>38</sup> See, especially, *Sparrow*, *supra* note 6 and *Van der Peet*, *supra* note 28.

<sup>39</sup> See *supra* note 14.

Appeal for Ontario.<sup>40</sup> In particular, I was initially struck by the court's discussion of whether it was necessary for a Métis rights claimant "to establish a direct genealogical link to the historical Métis community that is the source for the s. 35 right."<sup>41</sup> Judge Vaillancourt's conclusion on this point had been contested by the first appeal judge, Justice O'Neill.<sup>42</sup> O'Neill J. dismissed the Crown's statutory appeal from trial, but varied Judge Vaillancourt's decision in a number of areas, including the requirement that an individual prove a genealogical connection to an historic Métis society. He cited extensively from the evidence and from *RCAP Perspectives and Realities*, noting the latter's position that ancestry need not be equated with genealogy,<sup>43</sup> and concluded that it "would be wrong [...] to require that in defining who a Métis person is, the individual be required to be of necessarily genetic 'aboriginal ancestry'."<sup>44</sup> Justice O'Neill reasoned:

Blood quantum requirements for Métis people should be rejected because they reveal little about how an individual defines his or her own identity in relation to a Métis community. Requiring proof of a genealogical tie to the original Métis inhabitants of the relevant Métis community places, in my view, too heavy a burden on Métis applicants and too easily leads to the extinguishment of Métis rights through attenuated blood lines.

Requiring that a person's grandparents be Métis runs a real risk of extinguishing the Métis rights of subsequent generations by both stealth and fiat. This is something that must be avoided if s. 35 is to receive a generous and purposive interpretation[.]<sup>45</sup>

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<sup>40</sup> *Powley (C.A.)*, *supra* note 18.

<sup>41</sup> *Ibid.* at para. 150.

<sup>42</sup> *R. v. Powley* (2000), 47 O.R. (3d) 30, [2000] 2 C.N.L.R. 233 (Sup. Ct. J.) [hereinafter *Powley* (Sup. Ct.)]. The Crown had made an unsuccessful appeal to the Superior Court of Justice pursuant to s. 116 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33.

<sup>43</sup> *Powley* (Sup. Ct.), *ibid.* at paras. 44-55. In *RCAP Perspectives and Realities*, *supra* note 26 at 201, the Commission wrote [emphasis added]:

The determination of Métis identity (and indeed Aboriginal identity) is not merely a question of genetics. A Métis person certainly has both Aboriginal and non-Aboriginal ancestry, but *ancestral links may also be non-genetic*. They sometimes involve marriages or adoptions, family links that are as deeply cherished as blood connections.

<sup>44</sup> *Powley* (Sup. Ct.), *ibid.* at para. 62.

<sup>45</sup> *Ibid.* at paras. 56-57. O'Neill J.'s definition was approved and applied in *R. v. Howse*, [2000] 3 C.N.L.R. 228, [2000] B.C.J. No. 905 (QL) (Prov. Ct.), rev'd on other grounds [2002] 3 C.N.L.R. 165, 2002

Rather than wading into the issue, the Court of Appeal ultimately held that it was neither necessary nor appropriate to determine the issue in the instance—and devoted all of seven paragraphs (of 179) to the matter.<sup>46</sup> Still, my first impression upon reading the court's reasons was that, of all issues raised therein, this was the one that went to the very crux of s. 35, and not just as concerns the Métis.

Could it possibly be the case that constitutional rights are, by definition, a matter of genetic inheritance? Would this not lend at least superficial credence to broadside attacks

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BCSC 235, leave to appeal granted 2003 BCCA 152, [2003] B.C.J. No. 508 (QL). In this passage, Justice O'Neill declined to accept the MNC's (more restrictive) "National Definition of Métis," to which the MNO as a member ascribes. The trial evidence showed that, in accordance with the National Definition, the MNO demands its members have a certified genealogical connection to the historic Métis Nation as well as proof that at least one of their grandparents was an Aboriginal person. See *Powley* Transcript, vol. 1 (27 April 1998) at 61-62, 118-19 (Belcourt examination-in-chief). One can deduce from (a) the evidence with respect to Steve Powley's family tree (the grandmother through which he traced Aboriginal lineage was apparently already four generations removed from the nearest First Nations ancestor) and (b) the fact of Powley's being granted membership in the MNO, that "Aboriginal person" in the context of the MNC definition must rest on matters of cultural or community attachment rather than a notion of "blood quantum." Hence, there is no contradiction in the MNO's requiring proof at the level of one's grandparents and its stating that blood quantum "is never a factor" in membership (*Powley* Transcript, *ibid.* at 61). But the MNC definition does preclude any more recent "naturalisation": the marriage and adoption connections to which *RCAP Perspectives and Realities* alludes in the passage quoted *supra* note 43, would have to be at least two generations removed from the claimant him- or herself. It would therefore appear that, where a Métis person married a non-Métis person today and the family lived together as part of a Métis community, the non-Métis person could never satisfy the MNC requirements, although his or her offspring would.

<sup>46</sup> I do not imply that the court should have attempted to provide an answer. By this time, the Crown had conceded that the Powleys traced their ancestry to the historic Sault Ste. Marie Métis community, and thus that they could satisfy even the more demanding test. In this context, Justice Sharpe admirably began his analysis (*supra* note 18 at para. 75) with a "cautionary note [...] against the temptation to pronounce broadly upon all possible aspects of the rights of the Métis people," holding that the court should confine itself to the matters necessary for the resolution of the appeal. He added: "A full articulation of the shape and subtle contours of constitutionally protected Métis rights will undoubtedly unfold over time in the usual incremental fashion of the common law." At least one intervener (CAP) pressed the Court of Appeal to endorse O'Neill J.'s view on the genealogical/ancestral issue on the grounds that a clear definition was needed "to facilitate government action on Métis rights" (para. 154), but the matter had not been canvassed seriously at trial and the appeal court lacked a strong record upon which to base a judgment. Sharpe J.A.'s approach to the judicial role is especially commendable in an area as inchoate as Métis rights (or, indeed, s. 35(1) rights more broadly), since it ensures that judgment will remain in a sense "provisional," open to being tweaked in the face of new or unforeseen circumstances. Moreover, it is liable to prompt further reflection in the public forum, increasing the chances that a more complete picture might develop before the issue is squarely broached in litigation. On this point, see also the comments of Justice Iacobucci in the *Powley* oral hearing in the S.C.C. (*R. v. Powley* Transcription of Cassettes (S.C.C.) (17 March 2003) at 52-53) and Jeremy Webber, "Beyond Regret: *Mabo*'s Implications For Australian Constitutionalism" in D. Ivison *et al.*, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 60 [hereinafter "Beyond Regret"] at 75.

that the constitutional recognition of “special rights” for Aboriginal peoples is an unjust species of “racial” inequality? On that score, the pretension that something specific in a person’s genealogy functions as a universal and necessary element of his or her connection to others not only brings to mind concepts of contestable saliency, but—perhaps more conclusively—also presumes that a particular conception of community is generalisable across all cultural contexts.<sup>47</sup> And if genealogy were an essential ingredient, how far back in one’s family tree would one be permitted to go in order to find an Aboriginal ancestor? For that matter, should the perspective be “pan-Aboriginal” or specific to each nation or community?<sup>48</sup>

While acknowledging that the notion of a “blood” ancestral connection—even when discovered relatively late in life—might often be a central motivator in an individual’s self-identifying as an Aboriginal person, and that some groups might find it an apt membership criterion, I instinctively felt that these were matters to be worked out by the persons and peoples themselves, not something to be imposed, as it were, from the outside.<sup>49</sup> Indeed, the notion of a genealogical requirement to supplement self-

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<sup>47</sup> The theory that humans might justifiably be categorised by “race” only began to flourish in the 19th century. Today, it is open to serious question (see *e.g.* Thomas F. Gossett, *Race: The History of an Idea in America* (Dallas: Southern Methodist University Press, 1963); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999)), although this certainly has not stopped humans from believing in or acting on ideas of racial classification. Backhouse states (*ibid.* at 7): “‘Race’ is a mythical construct. ‘Racism’ is not.” Moreover, the construct is one with distinctly western roots; writing in respect of the Mohawk tradition, Taiaiake Alfred states that notions of race are “alien to traditional thinking”: see *Heeding the Voices of our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Toronto: Oxford University Press, 1995) at 164.

<sup>48</sup> In a recent case, the Provincial Court of British Columbia ruled that it was not necessary for persons accepted by a modern Métis community in B.C. to “demonstrate a personal ancestral connection to the particular Métis persons who formed the British Columbia ancestral community”: *R. v. Willison*, 2005 BCPC 131, [2005] B.C.J. No. 924 (QL) at para. 113. It was enough, Stansfield Prov. Ct. J. (now C.J.B.C. Prov. Ct.) held, for the claimant to show a link to the broader Métis Nation of the Canadian West. *Contra* the B.C. Supreme Court decision in *Howse*, *supra* note 45 at para. 34.

<sup>49</sup> For example, until recently, the Mohawk community of Kahnawá:ke was governed by strict blood quantum rules of membership, requiring that individual members have at least 50 per cent “Mohawk

identification and community acceptance evokes a fetter on a people's discretion to accept whatever members it pleases.<sup>50</sup> As an example, consider the following variation on the facts of an actual case. Peter Jacobs's biological parents were, by his own reckoning, of Black and Jewish descents. But Peter was legally adopted in infancy by two members of the Mohawk community of Kahnawá:ke. He grew up as a Mohawk person with his adoptive family and extended relatives; he learned the Mohawk language and culture and married a Mohawk woman. By all accounts, he strongly self-identified as a Mohawk person.<sup>51</sup> Now presume that Peter actually satisfied the Kahnawá:ke membership criteria and was accepted by the community. And presume that Peter was apprehended while ostensibly in the pursuit of s. 35 rights held by the Kahnawá:ke community. Under such a scenario, would it not seem to be a colossal imposition for a court or government to say that, upon its investigation, Peter had no real genealogical connection, and therefore that it was beyond the power of the First Nation to use its s. 35(1) rights to his benefit?

In the wake of the Court of Appeal's judgment in *Powley*, I quickly formed an opinion: the possibility that the courts might erect a genealogical connection requirement

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blood." The policy was long a matter of contestation within the community: re-considering the blood quantum topic in 1990, the Kahnawá:ke Membership Committee expressed the consensus that the rule provided an effective, though not ideal, membership criterion. The quantum rule was the subject of a successful human rights challenge in *Jacobs v. Mohawk Council of Kahnawake*, [1998] 3 C.N.L.R. 68 (C.H.R.T.) [hereinafter *Jacobs*]. The community promulgated new rules in 2003, aimed at capturing a more traditional Mohawk conception of belonging. Under these, Mohawk lineage remained a factor, but one considered along with other indicators of cultural attachment: Tu Thanh Ha, "Mohawk membership no longer blood simple" *The Globe and Mail* (5 March 2003) A7. (For a history of the Kahnawá:ke experience with membership issues to 1995, see Alfred, *supra* note 47 at 163-77.)

<sup>50</sup> See discussion *infra* note 77.

<sup>51</sup> The above are the actual facts of the *Jacobs* case, *supra* note 49. What happened thereafter gave rise to Peter's court challenge: when Peter reached 21 years-of-age, he ceased to be considered a Mohawk person, "covered" as a dependent of his parents. Under the prevailing rules at the time, Peter's Mohawk wife also lost her membership status owing to the marriage. Peter later regained status under Bill C-31, *supra* note 4, but was informed by the Council that he did not meet the criteria of the band's membership laws. He then commenced the action in order to be reinstated as a member of the community.

revealed a misguided understanding of Aboriginal group-ness that, if pursued, would result in a substantial infringement upon the inherent right of Aboriginal peoples to self-define and govern their own affairs. Moreover, to demand that each individual claimant demonstrate that his or her ancestors belonged to the relevant Aboriginal community at a fixed historical moment would effectively resurrect a “frozen rights” approach to s. 35,<sup>52</sup> by way of its corollary assumption that the constitutional provision is aimed at communities as they existed at some point in the past, rather than as living, dynamic social groupings.<sup>53</sup> Far preferable, I thought, would be a “test” by which the only two criteria were self-identification and group acceptance.

I initially approached my thesis project with a notion that my argument would consist of a defence of the two-pronged test as an incident of inherent Aboriginal rights. After commencing my research, however, it became clear to me that I was begging a series of rather important questions about the existence of an Aboriginal people. An individual cannot merely “self-identify” in the abstract: he or she must do so as a member of some rights-bearing collectivity. Likewise, “group acceptance” of that individual cannot but occur in the context of an identifiable group. This leads to a set of even more

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<sup>52</sup> The term “frozen rights” was coined in *Sparrow*, *supra* note 6 at 1093, referring to what is to be avoided in the interpretation of “existing aboriginal rights” under s. 35(1). On this point, the Court relied on Brian Slattery’s observation in “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 [hereinafter “Understanding”] at 782 that “the word ‘existing’ [...] suggests that the rights in question are affirmed in a contemporary form rather than in their primeval simplicity and vigour.”

<sup>53</sup> Evidence suggests that it was the custom of many Aboriginal peoples to permit “naturalisation” on grounds other than genealogy. Alfred, *supra* note 47 at 163, states “Kahnawake as a community had traditionally been extremely receptive to the integration of outsiders. Mission records from the early period of the community’s history confirm that Mohawks at Kahnawake had continued the traditional Iroquois practice of adopting and assimilating captives[.]” Other historical research suggests that individuals could quite readily move between First Nations, for instance, through inter-marriage, as refugees, or as prisoners of war: see Bruce G. Trigger, *Natives and Newcomers: Canada’s “Heroic Age” Reconsidered* (Montreal: McGill-Queen’s University Press, 1985) c. 2. In this connection, to pretend that a genealogical link to a member of the rights-bearing community at a chosen historical date is an essential element of proving an individual’s attachment to the community today is also to privilege the particular constitution of the community as of the date selected—to treat the “gene pool” at that time as sacrosanct.

fundamental questions about the nature of the peoples in whom Aboriginal rights reside, and the equal challenge of how to adjudicate whether a group of individuals is or is part of a “people” for the purposes of the Canadian Constitution.

This realisation modified the direction of my thesis. I felt it was necessary to examine in greater detail the issue of s. 35 “peoplehood,” with a view to understanding membership in this context, and ultimately to proposing a re-working of the doctrine of Aboriginal rights as it has developed thus far in the Supreme Court of Canada.

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On 19 September 2003, right around moose-hunting season and almost ten years after Steve and Roddy Powley were charged with the *Game and Fish Act* offences, the Supreme Court of Canada became the third appellate court to agree with Vaillancourt Prov. Ct. J. in entering acquittals. According to the Court:

The term “Métis” in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.<sup>54</sup>

In this vein:

The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.<sup>55</sup>

[...]

[T]he inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant

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<sup>54</sup> *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 at para. 10 [hereinafter *Powley* (S.C.C.)]. The Court relied primarily on the Royal Commission on Aboriginal Peoples for this conclusion: *RCAP Perspectives and Realities*, *supra* note 26 at 199-200, 202.

<sup>55</sup> *Powley* (S.C.C.), *ibid.* at para. 13.

feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.<sup>56</sup>

The Court held that an individual can claim s. 35(1) rights as a Métis person if he or she “belong[s] to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right.”<sup>57</sup> For greater specificity, it added:

- a “Métis community” is “a group of Métis [persons] with a distinctive collective identity, living together in the same geographic area and sharing a common way of life”;<sup>58</sup>
- identification of the rights-bearing community requires, “[i]n addition to demographic evidence, proof of shared customs, traditions, and a collective identity”;<sup>59</sup>
- the required degree of *continuity and stability* is met by evidence of the historical community's persistence, although “the focus [is] on the continuing practices of members of the community, rather than more generally on the community itself”;<sup>60</sup>
- temporally, “[t]he focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs,” since it is only “those practices, customs and traditions that predate the imposition of European laws and customs on the Métis” that receive constitutional protection;<sup>61</sup>
- evidence of *belonging* engages “three broad factors as indicia of Métis identity”: (1) self-identification (which “should not be of recent vintage”); (2) ancestral connection (or “proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means”); and (3) acceptance by the modern community (“past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups ... an objective demonstration of a solid bond of

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<sup>56</sup> *Ibid.* at para. 17.

<sup>57</sup> *Ibid.* at para. 12 (also para. 23).

<sup>58</sup> *Ibid.* at para. 12.

<sup>59</sup> *Ibid.* at para. 23.

<sup>60</sup> *Ibid.* at paras. 24-27. The Court stated elsewhere in the judgment (para. 29) that claimants must demonstrate “the continuity between their customs and traditions and those of their Métis predecessors.”

<sup>61</sup> *Ibid.* at para. 37.

past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community”).<sup>62</sup>

With respect to the last point, the Court reiterated: “[N]o matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right.”<sup>63</sup>

On the record before it, the Court found that the evidence supported the trial judge’s finding of an historic Métis community at Sault Ste. Marie.<sup>64</sup> Furthermore, the “continuity and stability” criterion was met, since the community’s protracted lack of visibility was explained by other circumstances: “There was never a lapse; the Métis

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<sup>62</sup> *Ibid.* at paras. 30-33. With respect to the “ancestral connection” requirement, the Court rejected (at para. 32) the notion of a minimum blood quantum. The necessity, however, of identifying an ancestor who belonged to the historic community gives much heft to the community composition as of a point of time in the past: see *supra* notes 44-53 and accompanying text.

<sup>63</sup> *Ibid.* at para. 34. It is noteworthy that, in *R. v. Simon*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390 [hereinafter *Simon* cited to S.C.R.] (a case ultimately decided under s. 88 of the *Indian Act*, *supra* note 4), the Court rejected a submission that First Nations persons claiming treaty rights should have to prove direct descendancy from a person who belonged to the nation at the time of the treaty’s signing. The treaty in *Simon* dated to 1752, and was signed by the Chief and three other members of the Shubenacadie Mi’kmaq tribe. Simon was a registered member of the modern Shubenacadie band, which inhabited the same area as the original treaty signatories. Dickson C.J.C. held (at 407-08 [emphasis in original]):

This evidence alone, in my view, is sufficient to prove the appellant’s connection to the tribe originally covered by the Treaty. True, this evidence is not conclusive proof that the appellant is a *direct* descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.

In subsequent cases that were decided under s. 35, the Supreme Court referred simply to an individual’s current membership in an *Indian Act* band, suggesting this is sufficient to establish a connection, without making reference to issues of descent (direct or otherwise) from individual members of the nation at the time of treaty: e.g. in *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1031, 70 D.L.R. (4th) 427 [hereinafter *Sioui* cited to S.C.R.], Lamer J. (later C.J.C.) mentioned only that the respondents were registered under the *Indian Act* and were members of the modern Huron-Wendat band (ignoring, or treating as irrelevant, trial evidence showing that they were also descendants of a member of the Huron nation at the time of the treaty in 1760: see *R. v. Sioui*, [1987] R.J.Q. 1722, 8 Q.A.C. 189 (C.A.) (*per* Bisson J.A.)). See also: *R. v. Howard*, [1994] 2 S.C.R. 299, 115 D.L.R. (4th) 312; *R. v. Sundown*, [1999] 1 S.C.R. 393, 177 Sask.R. 1.

<sup>64</sup> *Ibid.* at paras. 21-23. Amongst other things, the evidence from the Powleys’ expert was that, at the time a government surveyor visited the Sault Ste. Marie area in 1846, “the people of mixed ancestry living there had developed a distinct sense of identity and Indians and Whites recognized them as being a separate people” (*Powley* Trial Exhibit 30 (indexed as “Dr. Ray’s Report”) at 56, quoted *ibid.* at para. 22).

community went underground, so to speak, but it continued.”<sup>65</sup> Finally, there was “no reason to overturn the trial judge’s finding that the Powleys are members of the Métis community that arose and still exists in and around Sault Ste. Marie.”<sup>66</sup> Although the Powleys’ ancestors, like a significant number of other historic Métis families,<sup>67</sup> accepted the benefits of the Robinson Treaty and acquired membership in local Indian bands, this was not sufficient to extinguish the Powleys’ claim to Métis rights.<sup>68</sup>

The Court closed by agreeing with the Crown that, “[t]he development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority.”<sup>69</sup> The lack of such a method, however, did not justify infringing the Powleys’ s. 35(1) rights in the interim. A stay of the decision below had expired 19 months prior and, noting that chaos had not ensued, the Court declined to order a further stay. The need to consult and negotiate did not mandate that the Court “suspend the recognition of a right that provides a defence to a criminal charge.”<sup>70</sup>

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<sup>65</sup> *Ibid.* at para. 27. The Court cited extensively from the expert testimony of Dr. Lytwyn for this conclusion. Although the general crux of Dr. Lytwyn’s evidence—its support of a Métis presence in the Sault Ste. Marie area—was supported by the other experts (see *Powley* (Prov. Div.), *supra* note 5 at para. 29), I note in passing that the Court’s reliance upon his Report rather than on that other evidence is at odds with its frequent admonition regarding the considerable deference owed on appeal to trial judge’s findings of fact (including his or her assessment of the credibility of the testimony of expert witnesses): *Van der Peet*, *supra* note 28 at para. 81 (*per* Lamer C.J.C.); *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at paras. 1-37 (*per* Iacobucci and Major JJ.). At trial, Judge Vaillancourt detailed a number of reasons why he was “hard pressed to place great reliance” on Dr. Lytwyn’s evidence, concluding that the frailties would normally render the evidence of “little or no value.” See also *Powley* (Prov. Div.) at paras. 27-29; *Powley* Transcript, vol. 6 (9 September 1998) at 285-88 (Defence counsel reply submissions). Trial judges in other cases (before and after the trial and Supreme Court judgments in *Powley*) have also commented unfavourably on the value of Dr. Lytwyn’s evidence (see *R. v. Decaire*, [1998] O.J. No. 4970 (QL) at para. 34 (Ct. J. (Prov. Div.)); *R. v. Naponse*, [2001] O.J. No. 5924 (QL) at paras. 19-20 (Ct. J. (J.P.)), *aff’d* (2002), 61 O.R. (3d) 46, 56 W.C.B. (2d) 77 (Ct. J.); *R. v. Baker*, 2005 ONCJ 38 at para. 16) and it is curious in this case that the Court would have chosen to lean so heavily on Dr. Lytwyn’s evidence.

<sup>66</sup> *Ibid.* at para. 35.

<sup>67</sup> *Powley* (C.A.), *supra* note 18 at para. 23.

<sup>68</sup> *Ibid.* at paras. 138-39; *Powley* (S.C.C.), *supra* note 54 at para. 35.

<sup>69</sup> *Powley* (S.C.C.), *ibid.* at para. 49.

<sup>70</sup> *Ibid.* at paras. 51-52. See also *Powley* (C.A.), *supra* note 18 at paras. 171-78.

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From the standpoint of legal scholarship, the *Powley* trial provides an exceptional case-study through which to research issues of group existence and individual membership. The preponderance of evidence pointed towards the presence of a distinct community of “mixed-blood” families in the Sault Ste. Marie area prior to the negotiation of the Robinson-Huron Treaty in 1850, although details about the community (such as the density of interaction between its members) were less clear.<sup>71</sup> The record was even

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<sup>71</sup> The Crown conceded in submissions that the evidence showed a group of Métis persons existing in Sault Ste. Marie by 1850, but argued that this was not “a community by any means” and certainly not for the purposes of s. 35 of the *Constitution Act, 1982: Powley* Transcript, vol. 6 (8 September 1998) at 171 (Crown submissions). The defence evidence, obviously, was to the contrary. In the expert opinion of Dr. Ray (which was accepted by Judge Vaillancourt), by the time government surveyor Alexander Vidal visited Sault Ste. Marie in 1846, “the people of mixed ancestry living there had developed a distinctive sense of identity and Indians and Whites recognized them as being a separate people.” (Dr. Ray’s Report, *supra* note 64 at 56.) Dr. Ray drew parallels between what he saw emerging in Sault Ste. Marie and what historian Nicole St-Onge described in respect of various Métis settlements in Manitoba (*ibid.* at 55). The record contained some evidence of “mixed-blood” persons acting in concert with local Anishinabek (Ojibway) persons in asserting Aboriginal rights in the region: *e.g.* in November 1849, an armed party of Métis and Anishinabek persons raided the Quebec Mining Company property in Mica Bay (on the Lake Superior shore): *ibid.* at 64. As a result of the raid, the alleged ringleaders—Anishinabek Chiefs Shingwakance and Nebenaigoching, two prominent members of the “mixed-blood” population (Pierrot Lesage and Charlot Boyer), and two non-Aboriginal persons—were transported to Toronto to stand trial, although they were ultimately released: James Morrison, “The Robinson Treaties of 1850: A Case Study” (31 March 1994) [unpublished, prepared for the Royal Commission on Aboriginal Peoples, Treaty and Land Research Section] at 78-84. In the meantime, Vidal and T.G. Anderson, who had been appointed by the Executive Council of the province to look into Aboriginal claims in the region, wrote in their Report:

Another subject which may involve a difficulty is that of determining how far Half breeds are to be regarded as having a claim to share in the remuneration awarded to the Indians, and (as they can scarcely be altogether excluded without injustice to some) and where and how the distinction should be made between them: many of these are so closely connected with some of the bands, and being generally better informed exercise such an influence over them, that it may be found scarcely possible to make a separation, especially as a great number have been already so far recognized as Indians, as to have presents issued to them by the government at the annual distribution at Manitowawning. [As cited in Dr. Ray’s Report, *ibid.* at 68.]

The following year, when William Benjamin Robinson came to treat with the Aboriginal peoples of the Upper Great Lakes, he informed the “half-breeds” at Sault Ste. Marie that he came to treat with the Anishinabek Chiefs: it was up to the Chiefs to allocate the monies provided as they wished. In treaty negotiations, Shingwakance and Nebenaigoching (ultimately unsuccessfully) demanded a provision securing to some 60 “half-breeds” a free grant of 100 acres of land each (see: Robinson’s Report to Superintendent-General Bruce, reproduced in Alexander Morris, *The Treaties of Canada* (Toronto: Belfords, Clarke & Co., 1880) at 18; *RCAP Perspectives and Realities*, *supra* note 26 at 260 (citing Morrison, *ibid.* at 118)). But with respect to the presence of a Métis community in the region, this appears equivocal: it illustrates some recognition by the Anishinabek of the claims of “mixed-blood” persons, but one is left to wonder, if the community was so established, why it did not produce advocates of its own.

(cont’d)

murkier with respect to what happened to the community between 1850 and the establishment of modern political organisations in the 1970s. Perhaps the most persuasive evidence of a persistent Métis community came from the Crown's own expert, Gwynneth Jones, who illustrated that the "mixed-blood" residents of the Indian reserves effectively formed their own sub-community for many purposes.<sup>72</sup> The oral histories of

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Moreover, the conclusion is not automatic that Vidal and Anderson were addressing the existence of a Métis *community* so much as the question of membership in the Anishinabek community. And it is unclear from Robinson's account as to whether the Anishinabek Chiefs were asserting land rights on behalf of a Métis *community* or were merely asking that lands in fee be set aside for various individuals.

<sup>72</sup> While her Expert Report suggested that the persistence of the Métis population in the Sault Ste. Marie township seemed to be declining in the early-20th century (Jones Report, *supra* note 30 at 14), Jones suggested that the families who moved on reserve maintained a degree of separateness. There was some difference in the patterns of life of the Métis and First Nations persons resident on the Batchewana reserve; the groups were less distinguishable on the Garden River reserve, but there were insufficient details to say that the Métis inhabitants were integrated in all respects. She concluded (*ibid.* at 33):

Although the Sault Metis resident at Batchewana and Garden River often described themselves as "Indian", residential patterns and reserve voting trends (especially at Garden River) indicate some degree of community feeling was present among the Metis families, especially those of French descent and Roman Catholic religion. Although the families in the town of Sault Ste. Marie became somewhat more diffused through the city as the nineteenth century went on, recognizable residential clusters of mixed-blood descendants were still present in the 1901 census. Other Aboriginal and non-Aboriginal residents of areas such as St. Joseph's Island and Garden River were also able to identify readily a "half-breed" and an "Indian" population. While this evidence is not conclusive, it is suggestive of a separate community of Métis families persisting in the vicinity of Sault Ste. Marie at least into the twentieth century.

This circumstantial evidence, I think, is stronger than that cited by the Court of Appeal and Supreme Court: namely, that the Borron Commission in 1891 recommended to the Ontario government that Métis persons be removed from the treaty annuity lists (see *Powley* (C.A.), *supra* note 18 at para. 139; *Powley* (S.C.C.), *supra* note 54 at para. 35). The Borron example does illustrate a governmental practice of distinguishing between Métis and First Nations persons (and of considering Métis persons who had taken treaty as not having surrendered their "Métis-ness") but, in context, it arguably provides only weak support for the existence of a distinct Métis people: as the trial judge noted (*Powley* (Prov. Div.), *supra* note 5 at paras. 50-51), the distinctions were largely motivated by Crown concerns over financial obligations. As early as the 1844 Report of the Bagot Commission, it was suggested that the Crown accomplish a reduction in annuity payments by declaring "mixed-blood" persons ineligible. (The Bagot Commission, its Report, and the governmental response are detailed in Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward Looking Back*, vol. 1 (Ottawa: Communication Group, 1996) at 267-70 [hereinafter *RCAP Looking Forward Looking Back*]. See also John F. Leslie, *The Bagot Commission: Developing a Corporate Memory for the Indian Department* [unpublished, presented at the annual meeting of the Canadian Historical Association, June 1982].) Likewise, in the Borron instance, these persons were singled out not because of their connection to a distinct Aboriginal people, but rather for their perceived *lack* of the same. Moreover, the Borron recommendations should be considered in light of the fact that at roughly the same time, Ontario was locked in a dispute with the governments of Canada and Quebec over liability to pay Robinson Treaty annuities: see *Ontario v. Canada; In re Indian Claims* (the "Robinson Annuities case") (1895), 25 S.C.R. 434, aff'd [1897] A.C. 199 (H.L. (1896)).

the defence lay witnesses, on the other hand, did not extend back to the historical Métis community; their testimony was generally limited to explaining how their ancestors were at some point disentitled to Indian status and the ability to live on reserve, at which time they asserted or re-asserted an identity separate from that of the First Nations people.<sup>73</sup> Complicating the situation further was more recent movement in the opposite direction: following the passage of Bill C-31,<sup>74</sup> some individuals in Sault Ste. Marie who had formerly claimed Métis identity were able to seek, and receive, status under the *Indian Act*. The defence witness Olaf Bjornaa was one of these persons.<sup>75</sup>

The *Powley* record illustrated a relatively high degree of fluidity with respect to the contours of the Sault Ste. Marie Métis community. In connection with the Supreme Court's emphasis on continued *individual* practice of historical Métis customs and

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<sup>73</sup> Art Bennett testified that his (and Steve Powley's) grandmother, Eva Micks (née Lesage), lost her status, was "ostracized by her own people," and was asked to leave the Batchewana reserve upon marrying a "white man": *Powley* Transcript, vol. 1 (29 April 1998) at 285 (Bennett examination-in-chief). Jack Bouchard testified that his grandfather moved the family from the Thessalon reserve when Bouchard's mother was still a child (although Bouchard clearly self-identified as a Métis person, there was no indication of whether his family tree included members of the historic Métis community, as opposed to First Nations persons who left their communities more recently): *ibid.* at 379-80 (Bouchard examination-in-chief). Olaf Bjornaa testified that his grandmother was a First Nations person, but that she lost status upon marriage (like Bouchard, Bjornaa's evidence did not indicate that his ancestors included members of the historic Métis community): *ibid.*, vol. 4 (8 May 1998) at 185 (Bjornaa examination-in-chief).

<sup>74</sup> *Supra* note 4.

<sup>75</sup> At the time of the *Powley* trial, Bjornaa had been registered as an Indian for approximately two years. He testified that he was motivated to seek status as a result of his poor health (registration under the Act provided him with certain medical benefits) and in order that his children and grand-children might also receive status and therefore benefits such as education. Bjornaa stated that he still kept his MNO card with him, although his registration under the *Indian Act* meant that it was no longer valid. Bjornaa mentioned that he was an off-reserve member of the Batchewana band and, at the time, not entitled to vote in band council elections (subsequently, in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 [hereinafter *Corbiere*], the Supreme Court struck down the *Indian Act* provision stating that only persons "ordinarily resident" on a reserve could vote in band elections). In the context of his remarking on his greater degree of participation as a member of the MNO than as an off-reserve member of the Batchewana Band, Bjornaa stated that he still identified as a Métis person "in a lot of ways": *Powley* Transcript, vol. 4 (8 May 1998) at 193-96 (Bjornaa examination-in-chief).

In addition to Bjornaa, Art Bennett attempted to get status for his mother, and Jack Bouchard applied for registration himself, under Bill C-31 (although the latter stated that he only applied in order to receive governmental proof that his grandfather was Aboriginal, so that he could tender this to Métis organisations in support of his application to join): *ibid.*, vol. 1 (29 April 1998) at 287 (Bennett examination-in-chief) and 372, 378 (Bouchard examination-in-chief).

traditions, this makes us ask to what extent the current state of the law reflects a connection between Métis rights and an ongoing, viable, and distinct Aboriginal people. Interpreting the Court's judgment literally, could a contemporary rights-holding group not be merely a loose conglomeration of Aboriginal individuals or families (albeit individuals or families with some ancestral connection to an historically distinct community) who engage separately in the practices of their forebears and who are neither Inuit nor currently registrable under the *Indian Act*?<sup>76</sup>

On the topic of the contemporary community, of what relevance are organisations such as OMAA and the MNO? This question was not just peripheral to the *Powley* proceedings. The defence witnesses revealed the schism between the two bodies, and this division was exploited by Crown counsel in an attempt to show that it did not make sense to speak of Métis rights until the matter of political representation was settled. Beyond this, the Crown argued on the first appeal that the trial judge had erred by treating membership in a modern, voluntary organisation such as OMAA or the MNO as sufficient to indicate acceptance "by the Métis." The Crown submitted that, on the contrary, "the legal principle that aboriginal rights arise from the distinctive culture of the aboriginal community in question" mandated that the community acceptance criterion be fulfilled "by a local Métis community in continuity with an historic Métis community."<sup>77</sup>

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<sup>76</sup> It goes without saying that this understanding of the law sits uncomfortably beside the notion of Aboriginal rights as group rights. Yet in many ways, the Court's emphasis on continued *individual* practice of the customs and traditions of the historical community (see *supra* note 60) comes off like the "equal and opposite reaction" to its decision concerning s. 2(d) of the *Charter* in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 78 A.R. 1. In that case, McIntyre J. held that freedom of association protects the exercise in association of the constitutional rights of individual persons. In *Powley*, the Court almost seems to suggest that s. 35(1), at least as concerns the Métis people, protects the individual exercise (today) of constitutionally-protected practices of (historical) groups!

<sup>77</sup> *Powley* (Sup. Ct.), *supra* note 42 at para. 42. Furthermore, the Crown argued that Judge Vaillancourt's "two-part process" for determining individual "status" (comprising the three elements of

In light of the historic marginalisation of the Métis and the consequent difficulty in maintaining Métis collectivities, O’Neill J. instead proposed a modification to the nation-based approach in *RCAP Perspectives and Realities*, such that a court might give effect to membership in organisations such as OMAA and the MNO:

Surely an aboriginal people who reside in a community or locality in more or less proximity to one another, who share the same culture and interests, but who are not in any way formally recognized by government, can collectively organize and form a local association, branch or chapter for the purposes of crystallizing and shaping their community. Accordingly, where the Métis right being asserted is site-specific, [the group acceptance criterion could occur in the context of] the Métis community or a locally-organized community branch, chapter or council of a Métis association or organization with which that person wishes to be associated.<sup>78</sup>

The Court of Appeal effectively charted a middle ground. It agreed with the Crown that “[n]either OMAA nor the MNO constitute[s] the sort of discrete, historic and site-specific community contemplated by *Van der Peet* capable of holding a constitutionally protected aboriginal right.”<sup>79</sup> However, membership in these organisations provided “at least some evidence of community acceptance.” Métis communities did not “have a formal legal structure or organization [but were] based on history, kinship and shared practices.” “Proof of membership in such a community,” the court held, “is bound to be to a large extent impressionistic.”<sup>80</sup> In the Powleys’ case, there was evidence going beyond

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(a) Aboriginal ancestry, (b) self-identification, and (c) community acceptance) required “a fourth element, objectively determinable cultural ties of the claimant to the local Métis community” (*ibid.*). Justice O’Neill rejected this submission on the grounds that, first, it ran counter to the exhortation in *Sparrow*, *supra* note 6 at 1106 that s. 35(1) be approached in a “purposive” manner—demanding “a generous, liberal interpretation of the words in the constitutional provision”—and, second, it would place “an unrealistic burden on applicants claiming Métis rights that are not placed on applicants claiming other aboriginal rights. Aboriginal rights are collective rights although each member of the collectivity has a personal right to exercise them. [...] The aboriginal rights claimant must be a member of that aboriginal community, but each individual within that community does not have to meet an individual cultural means test.” (*Powley* (Sup. Ct.) at para. 60.)

<sup>78</sup> *Ibid.* at para. 64.

<sup>79</sup> *Powley* (C.A.), *supra* note 18 at para. 144.

<sup>80</sup> *Ibid.* at para. 145.

membership in the provincial associations, and there was no ground for overturning the findings of fact below.<sup>81</sup> The Supreme Court effectively endorsed this view.<sup>82</sup>

The establishment of representative organisations can fulfil an important role as a rallying point for communities. As visible symbols of the collectivity, they may provide an added cohesion and sense of pride.<sup>83</sup> Yet the existence of competing organisations poses an ongoing problem for the direction of the Métis people in Ontario.<sup>84</sup> Following the Supreme Court's ruling in *Powley*, officials from the Ministry of Natural Resources met with their counterparts in OMAA and the MNO to discuss the implications of the judgment. The Ministry's preliminary discussions with the MNO resulted in agreement on four basic points, which the parties crystallised into an Interim Harvesting Agreement: (i) the MNO would issue a maximum of 1 250 of its Harvester's Certificates in 2004,<sup>85</sup>

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<sup>81</sup> *Ibid.* at paras. 148-49.

<sup>82</sup> The Court stated: "Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community." (*Powley* (S.C.C.), *supra* note 54 at para. 33.)

<sup>83</sup> For example, Art Bennett testified that the Sault Ste. Marie Métis community "was always here ... [W]e were here, just not recognized or not organized ... but I do think OMAA brought us together politically." (*Powley* Transcript, vol. 1 (29 April 1998) at 293 (Bennett examination-in-chief). For a work devoted to this topic, see Joe Sawchuk, *The Metis of Manitoba: Reformulation of an Ethnic Identity* (Toronto: Peter Martin Associates, 1978).

<sup>84</sup> MNO President Tony Belcourt testified eloquently at trial about the animosities between OMAA and the MNO in the context of how, in his opinion, these (and the OMAA lawsuits they spawned) were hampering each organisation in the representation of its members. See *Powley* Transcript, vol. 1 (27 April 1998) at 113-17 (Belcourt examination-in-chief). The lay witnesses had all resigned their memberships in OMAA to join the MNO, and testified somewhat disparagingly as to their feelings about the former organisation: see *ibid.* at 330-31 (Bennett cross-examination), 399 (Bouchard examination-in-chief), vol. 4 (8 May 1998) at 223-25 (Bjornaa cross-examination).

<sup>85</sup> At the time, the MNO had already been issuing Harvester's Certificates for nearly 10 years. Over that period, the MNO estimated it had only issued approximately 1 000 Certificates. The Certificates are issued under the MNO's official Harvesting Policy, a detailed document that sets out objectives related to conservation, safety, respect for the private property rights of landholders, reporting issues of concern to Captains of the Hunt, *etc.* See Métis Nation of Ontario, *The Facts: The Métis Nation of Ontario and the Ontario Ministry of Natural Resources made an historic agreement on Métis harvesting this past July* at 1, online: MNO <[http://www.metisnation.org/harvesting/PDF/INTERIM\\_2004.pdf](http://www.metisnation.org/harvesting/PDF/INTERIM_2004.pdf)> (date accessed: 13 November 2004); Métis Nation of Ontario, *Harvesting Policy*, filed as *Powley* Trial Exhibit 13 (indexed as "Copy of MNO harvesting policy and MNO harvester's certificate"), para. 3 and *Powley* Transcript, vol. 1

with the parties committed to establishing a process to increase this number in subsequent years; (ii) the Ministry would apply the IEP to MNO Harvest Certificate holders, hunting or fishing for food within their traditional territories, in the same way that the IEP applied to First Nation communities; (iii) the Interim Harvesting Agreement would be of two years' duration, but could be extended by mutual consent until a Final Agreement was in place; and (iv) the MNO agreed to permit an independent evaluation of its Harvester's Certificate Registry process, to verify the validity of the Registry as "a unique and rich source of genealogical and historical information on Métis individuals, families and communities in Ontario."<sup>86</sup>

The discussions with OMAA did not reach a similar state of concord. Métis persons holding only OMAA cards continue to fall outside the IEP and to be liable to prosecution under the provincial game laws. There is some suggestion that OMAA views the situation as the Ministry's "let[ting] one Metis organization have special status and another not."<sup>87</sup> In any event, OMAA recently brought an unsuccessful application in the

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(28 April 1998) at 225-28 (Belcourt cross-examination). A more recent version may be found, online: <[http://www.metisnation.org/harvesting/Policy/mno\\_havr\\_policy.html](http://www.metisnation.org/harvesting/Policy/mno_havr_policy.html)> (date accessed: 16 August 2005).

<sup>86</sup> *The Facts*, *ibid.* at 2. This is not to suggest that the Interim Harvesting Agreement has resolved the issues satisfactorily. The Agreement was concluded on 7 July 2004 at the MNO's Annual General Assembly in Thunder Bay; subsequently, in the midst of the harvesting season, the Ministry announced that, in order to ensure that the 1 250 Harvester's Certificates for 2004 were issued "to individuals, and in areas, that would currently withstand scrutiny under the tests set out in the *Powley* decision" and on the basis of the historical research available, it would only honour the Agreement for subsistence harvesting north of the Sudbury region. See David Ramsay, Minister of Natural Resources, letter to Tony Belcourt, President, MNO (19 July 2004), online: MNO <[http://www.metisnation.org/news/pdfs/Ramsey\\_letter.pdf](http://www.metisnation.org/news/pdfs/Ramsey_letter.pdf)> (date accessed 15 August 2005); Dave Payne, MNR Chief Negotiator, letter to Gary Lipinski, MNO Chief Negotiator (5 October 2004), online: MNO <[http://www.metisnation.org/news/pdfs/Payne\\_letter.pdf](http://www.metisnation.org/news/pdfs/Payne_letter.pdf)> (date accessed: 15 August 2005); Ontario, Ministry of Natural Resources, *Implementing an Interim Harvesting Agreement with the Métis Nation of Ontario: Fact Sheet* (6 October 2004). In the face of this policy, MNO leadership accused the MNR of renegeing on the substance of the Agreement: see MNO, News Release, "Chiefs of Ontario and Métis Nation leaders demand an immediate meeting with Premier McGuinty" (7 October 2004). See also Tony Belcourt's submissions to Ontario's Standing Committee on Finance and Economic Affairs (Ontario, Legislative Assembly, *Debates* (12 January 2005) at F-1212).

<sup>87</sup> OMAA, "Question and Answer About Harvesting", online: <[http://www.oma.org/new\\_page\\_6.htm](http://www.oma.org/new_page_6.htm)> (date accessed 15 August 2005). OMAA does not issue Harvesting Certificates or have a Harvesting

Ontario Superior Court of Justice to nullify the Interim Harvesting Agreement between the Ministry and the MNO.<sup>88</sup>

*Powley* underscores another possible connection between the modern organisations and the self-identification of individuals. Entities like OMAA and the MNO, in addition to providing an observable forum in which members of the community come together, raise awareness of the Métis people to the point where a Steve Powley, reflecting on his Aboriginal ancestry in his mid-40s, might determine to get involved and seek membership. At odds with the Supreme Court's concern that self-identification be "of recent vintage,"<sup>89</sup> defence witness Jack Bouchard poignantly expressed his own experience as a person identifying later in life:

[Y]ou can't join any Métis group until you have documented proof, so I never really started searching to get the documented proof until in the last ... well, I think it was in '90 or '89 that I sent the papers to Indian Affairs, but does that mean I'm not an Aboriginal person? Look at how many people got their rights through C-31. I mean that bill wasn't passed till 1985 and a lot of these people and [...] kids of these people, they were White people. They never self-identified as Aboriginal people, but yet when that bill come out did Indian Affairs say, "No, you don't get this card cause you didn't self-identify before as an Aboriginal person?" That's ludicrous. Does an ... if an Italian person doesn't say "I'm an Italian person" for 30 years and then all of a sudden he says it, are we here to say, "Well, because you didn't say it earlier, you're not Italian." That's ... it's ... it just don't work that way. My parents didn't run up the

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Policy *per se*. According to Tony Belcourt, during his involvement with OMAA, the OMAA membership cards were used primarily for identification purposes: *Powley* Transcript, vol. 1 (28 April 1998) at 222 (Belcourt cross-examination).

<sup>88</sup> *Ontario Métis and Aboriginal Association v. Ontario (Minister of Natural Resources)* (17 June 2005), 23046/04 (Ont. Sup. Ct. J.), online: Métis Nation of Ontario <[http://www.metisnation.org/news/pdfs/OMAA\\_Judgment.pdf](http://www.metisnation.org/news/pdfs/OMAA_Judgment.pdf)> (date accessed: 15 August 2005). In brief, OMAA, along with a number of Métis individuals who did not benefit from the MNO Interim Harvesting Agreement and who were charged with various offences in the Ontario Court of Justice (*viz.* "Provincial Court"), went to Superior Court in part to challenge the Agreement. McMillan J. acceded to Ontario's motion that the application be dismissed, holding that the matter could be dealt with in the trial process (there were no judicial economies of scale in proceeding by way of application in the court above) and that, were the Superior Court to exercise its discretion to intervene, this would be to usurp the role of the trial court. He also held (at para. 10): "The applicant, O.M.A.A. is a corporation which does not enjoy *Charter* rights [*sic*] and which does not appear to have status or standing to challenge the interim agreement entered into between the M.N.R. and the M.N.O. concerning the recognition and regulation of the latter's Metis members."

<sup>89</sup> *Powley* (S.C.C.), *supra* note 54 at para. 31. See also *supra* note 62 and accompanying text.

streets in Nestorville hollering and screaming, "I'm an Aboriginal person." They didn't have to do that. They were nervous. The nervous is still here. I'm nervous being up here in the stand. My knees are knocking. If they were against the boards, you'd be hearing a Métis jig being tapped out[.]<sup>90</sup>

In this connection, *Powley* poses some further challenges: what, if any, ancestral connection to an Aboriginal people is necessary for a person to claim membership in a s. 35(2) people, and how should the law deal with a relatively short-lived self-identification?

In short, the case forces serious consideration of the following issues:

- How do we identify a "people" for the purposes of s. 35(2)?
- What role do organised associations play in this identification?
- What role do government statutes and regulations (like the *Indian Act*) play?
- To what extent must a contemporary community be linked to an historical one? (Is it possible for a "dormant" people to "resuscitate" after the passage of several generations?)
- Are there any restrictions on a people's ability to set membership requirements for its members?
- Is there any significance to the stage of a person's life at which he or she begins to self-identify as a member of a s. 35(2) people?
- Is there any significance to a person's having or not having a direct genealogical connection to members of historical Aboriginal communities?

The manner in which evidence and argument was presented in *Powley*, and the resultant court opinions, speak to all these issues. My challenge in the following chapters is to unravel them, and in so doing, to provide an opinion as to how these matters are best resolved for Canadians, both Aboriginal and non-Aboriginal.

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<sup>90</sup> *Powley* Transcript, vol. 2 (30 April 1998) at 15 (Bouchard examination-in-chief). As mentioned *supra* note 75, Bouchard had applied post-1985 to be registered as an Indian under the *Indian Act* in order that he might receive documentation to support an application to join a Métis organisation.

## II. The Constitution's Peoples: Preliminary Considerations

By the express terms of sub-section (2), the Aboriginal peoples of Canada to whom the “constitutional promise”<sup>1</sup> in s. 35 is made include “the Indian, Inuit and Métis peoples of Canada.”<sup>2</sup> The phrasing of s. 35(2) raises a preliminary issue: the text does not read like an exhaustive definition, and at least one author interprets it as suggesting that “there may be other peoples who could raise a reasonable claim that they ought to be considered ‘aboriginal’.”<sup>3</sup> At first blush, this suggestion may appear almost absurd. But upon closer inspection, the issues it raises function as an ideal *entrée* into some of the major themes of this thesis.

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As a preliminary point, choices of vocabulary have implications. If we resist taking the position that s. 35 is exhaustive, this opens up the possibility of a group's being able to express its peoplehood in indigenous terms, more in line with its self-understanding (*i.e.* without having to slot itself into a rigid “Indian, Inuit or Métis” trichotomy). This is preferable insofar as it might liberate a people from a sense of imposed identity, which may become an issue where it is forced to identify in set categories that it finds pejorative or otherwise non-reflective of its lived reality. Instances abound: the Inuit were until recently more commonly called *Eskimo*, a term roundly perceived as derogatory; many

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<sup>1</sup> The Supreme Court first described s. 35(1) as “a promise to the aboriginal peoples of Canada” in *Sparrow*, *supra* c. I, note 6 at 1083.

<sup>2</sup> *Constitution Act, 1982*, s. 35(2), *supra* c. I, note 13.

<sup>3</sup> Jack Woodward, *Native Law*, looseleaf ed. (Toronto: Carswell, 1989) at 7. The draughters of s. 35(2) expressly chose the word “includes” (which, under normal rules of construction, would introduce a non-exhaustive list) rather than “means” or another word that would indicate a strict equation between the phrase “Aboriginal peoples of Canada” and the three listed groups that follow. Indeed, the (equally authoritative) French version of the provision, which states “Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada” [emphasis added], arguably evinces an even clearer intention to leave s. 35(2) open.

peoples long called “Indian,” owing to an infamous geographical error by European voyagers, have rejected this term in favour of “First Nation.”<sup>4</sup> In addition to rectifying affronts and inaccuracies, a more flexible approach to naming better allows for evolution in the way that groups collectively identify, which is important given that identity is a matter of ongoing reflection and, thus, inherently protean. Over time, a community might find that a change in phraseology is necessary to capture more accurately a shifting sense of identity;<sup>5</sup> care should be taken to ensure that inflexible adherence to the names explicitly cited in s. 35(2) does not stultify this capacity for dynamic re-expression.

In turn, a non-exhaustive conception of s. 35(2) might result in fewer instances of perceived misappropriation of nomenclature. To many groups, this latter point represents a real threat to their identity. For example, as Catherine Bell has written:

The Metis National Council contends that s. 35(2) refers to a single Metis people. Underlying this position is the assumption that only descendants of the Metis nation

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<sup>4</sup> This includes many of the bands registered under the *Indian Act*, *supra* c. 1, note 4. Indeed, Indian and Northern Affairs Canada now commonly uses the term: see Canada, Indian and Northern Affairs, *Band Classification Manual: May 2005* (Gatineau, QC: Corporate Information Management Directorate (Information Management Branch), 2005), online: < [http://www.ainc-inac.gc.ca/pr/pub/fnnrg/2005/bandc\\_e.pdf](http://www.ainc-inac.gc.ca/pr/pub/fnnrg/2005/bandc_e.pdf) > (date accessed: 23 July 2005). In making this observation, I am not suggesting that there is a uniform view on the matter: the meaning of a word may undoubtedly be transformed, and some peoples may feel a sense of fraternity or pride in referring to themselves as “Indian.” Moreover, as Brian Slattery observes in “Our Mongrel Selves: Pluralism, Identity and the Nation” in Ysolde Gendreau, ed., *Community of Rights/Rights of Community* (Montreal: Thémis, 2003) 3 [hereinafter “Our Mongrel Selves”], where outsiders affix a label to heterogeneous groups inhabiting a vast territory, and these outsiders then begin to dominate in the area, communities that previously viewed themselves as separate might develop new kinships in the struggle to co-exist—a wider collective consciousness that adopts the outsiders’ term, but which transforms the original imposition towards liberatory ends. See also Alfred’s discussion of “nested” identities, *supra* c. 1, note 47 at 18-19.

<sup>5</sup> For example, apart from the various names outsiders used to describe the Métis (Half-breeds, *Otipemisiwak*, country-born, freemen/*gens libres*, *coureurs de bois*, *Canadiens*, *voyageurs*), the Métis themselves have identified differently at different times (*bois brûlés*, *chicots*, *Apeetogosan*, *Nahio*, *métif*, *Michif*). See Powley Transcript, vol. 1 (27 April 1998) at 32, 57-58 (Belcourt examination-in-chief), vol. 2 (30 April 1998) at 141-42 and (citing from Johann Kohl’s 1855 account) 245 (Dr. Ray examination-in-chief); Dr. Ray’s Report, *supra* c. 1, note 64 at Fig. 1; Peterson, *supra* c. 1, note 26 at 39; Paul L.A.H. Chartrand, “Aboriginal Rights: The Dispossession of the Métis” (1991) 29 Osgoode Hall L.J. 457 at 460 [hereinafter “Dispossession”]; Diane Paulette Payment, *“The Free People—Otipemisiwak”*: *Batoche, Saskatchewan, 1870-1930*, Studies in Archaeology, Architecture, and History (Hull, QC: Supply and Services Canada, 1990).

can legitimately identify as “Metis”. Allowing other mixed-bloods who are not connected to the Metis nation to identify as “Metis” distorts the history of the Metis as an indigenous nation in Western Canada.<sup>6</sup>

The MNC’s concern for the continued integrity of the Métis Nation should not be discounted: the word “Métis” is connected to a particular historical context, and if this were lost to view through ubiquity, it could have a detrimental effect on those whose self-identification is distinctly tied up in that meaning. To be clear, this is not a call to police the usage of the term “Métis,” nor a suggestion that the word *could* realistically be reserved to the Métis Nation: there may be distinct peoples in other areas of the country that also find succour in the term and all its rich connotations.<sup>7</sup> Perhaps the most notable is the people of Labrador, descended from exogamous relations between Inuit and European persons, that has alternatively been called “livyers,” “settlers,” and “Kablunangajuit.”<sup>8</sup> More recently, the group has self-identified as the “Labrador Métis.”<sup>9</sup> It would be futile, in my opinion, to suggest that it could or should be prevented from

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<sup>6</sup> C. Bell, “Who are the Metis People in Section 35(2)?” (1991) 29 Alta. L. Rev. 351 at 357. Although Bell wrote some time ago, the MNC continues to define the Métis people as co-extensive with the Métis Nation: See Métis National Council, “Who are the Métis?”, online: <<http://www.metisnation.ca/who/index.html>> (date accessed: 1 August 2005).

<sup>7</sup> Moreover, as noted in *RCAP Perspectives and Realities*, *supra* c. 1, note 26 at 259, there was historically a debate as to the proper bounds of the Métis Nation itself, particularly as concerns its eastern extremity (although this has largely been settled by the MNO’s accession to the MNC).

<sup>8</sup> The Labrador Métis were singled out in *RCAP Perspectives and Realities*, *ibid* at 255-57. See also *RCAP Looking Forward Looking Back*, *supra* c. 1, note 72 at 149-50; Labrador Métis Nation, “In the Spirit of Our Ancestors”, online: <<http://www.labmetis.org/sooa.htm#Our%20Heritage,%20Our%20Identity>> (date accessed: 1 August 2005).

<sup>9</sup> The usage of this term in the Labradorian context dates back to 1975: see “In the Spirit of Our Ancestors,” *ibid*; Newfoundland and Labrador Heritage, “The Métis”, online: <<http://www.heritage.nf.ca/aboriginal/metis.html>> (date accessed 1 August 2005). But it has since been adopted wholeheartedly, and forms a significant part of the people’s collective identity. In hearings before the Royal Commission on Aboriginal Peoples, a member of the then Labrador Métis Association (today the Labrador Métis Nation (“LMN”)) declared: “I say to you and to Canada we are not livyers. We are not settlers. We are Métis—the progeny of our Indian and/or our Inuit and European settlers who long ago settled this harsh and beautiful land when others considered Labrador to be the land God gave to Cain.” See *RCAP Perspectives and Realities*, *ibid*. at 256. (Incidentally, the LMN achieved intervener status in *Powley* at the Supreme Court level, along with other Métis representative organisations: namely, the MNC, the MNO, CAP, OMAA, the North Slave Métis Alliance, and the Red Sky Métis Independent Nation.)

doing so.<sup>10</sup> Arguably, though, a more organic approach to self-identification could preserve the meaning intrinsic to “Métis” and work against the sometime tendency to treat the word as a catch-all receptacle: if Aboriginal groups were free to identify otherwise than as laid out in s. 35(2), one would logically expect that only those groups that fundamentally identified with some conception of “Métis-ness” would be likely to adopt the term. Accordingly, there would be a reduced likelihood that the word’s historical signification might be obscured.<sup>11</sup>

In any dialogue, an insufficient sensitivity to the power of words and symbols can

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<sup>10</sup> Indeed, even Harry Daniels—a central figure in the original inclusion of the Métis in s. 35(2)—later expressed the views (a) that he was negotiating for peoples such as the LMN in addition to the traditional Métis Nation, and (b) that it was the LMN’s right to self-identify as Métis: see H.W. Daniels, letter to Kirby Lethbridge, President of the Labrador Métis Association (17 February 1994), reprinted in *RCAP Perspectives and Realities*, *ibid.* at 385 (App. 5F). See also Daniels’ recollection of his involvement in negotiations over the patriation “package” as President of the NCC: H.W. Daniels, “Foreword” in P.L.A.H. Chartrand, ed., *Who Are Canada’s Aboriginal Peoples?: Recognition, Definition, and Jurisdiction* (Saskatoon, SK: Purich, 2002) 11 at 12-13.

If we consider again the context of the *Powley* case, it is interesting that the OMAA website stresses that, unlike the MNO, it would extend membership to persons who satisfy the self-identification and community acceptance criteria, but whose ancestral roots (and thus aboriginal connection) lay outside the homeland of the historic Métis Nation. See “Question and Answer About Harvesting,” *supra* c. 1, note 87.

<sup>11</sup> There is also an issue regarding how popular usage detracts from the community aspect of Métis-ness, suggesting that “Métis” refers to the fact of a person’s mixed ancestry rather than his or her connection to a Métis collectivity. As Tony Belcourt testified in the *Powley* trial:

[T]here’s a great deal of confusion about who the Métis are and so other people will attribute terms to us that simply do not apply. Some people may say that, “I am Métis,” because they’ve been told by some people that if you are of mixed blood you are Métis and so the confusion arises with some First Nations who say, “Well, I must be Métis because I’m mixed blood,” and some people who say, “Well, I am a non-Status Métis.” These terminologies just do not exist in the Métis community. They never did. (*Powley* Transcript, vol. 1 (27 April 1998) at 38 (Belcourt examination-in-chief).)

Further on this point, see John Giokas & Paul L.A.H. Chartrand, “Who Are the Métis in Section 35?” in Chartrand, *ibid.*, 83. At least for the purposes of constitutional interpretation, the Supreme Court scotched this notion (see *supra* c. 1, note 54 and accompanying text). The Court also addressed the broader linguistic issues by suggesting that all distinctive peoples of mixed ancestry may be called Métis, the plural usage of “peoples” in the English version of s. 35(2) leaving open the possibility of speaking of a multiplicity of Métis peoples (*Powley* (S.C.C.), *supra* c. 1, note 54 at paras. 10, 11). While the Court’s approach might preserve the sense in which the word “Métis” captures the emergence of a distinct “New Nation” through intermarriage between Aboriginal and non-Aboriginal constellations, it does not deal with either (a) the issue of imposed identity (*i.e.* the possibility that the term “Métis” might not be accepted by all groups otherwise fitting the description) or (b) the need for dynamism (*i.e.* that groups must retain some flexibility to alter the symbols under which they collectively identify today). I respectfully think that the better focus is on the word “includes” (not on “peoples”) in s. 35(2).

lead to distortions, and an associated feeling of loss. Concerns of this sort should remain at the foreground in any study of Aboriginal rights and, indeed, in all legal scholarship. Therefore, while my focus in the subsequent analysis is on the three categories of peoplehood to which s. 35(2) expressly alludes, I do not suggest that the provision must of necessity be interpreted as exhaustive.

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Of course, all peoples recognised under s. 35 must be *Aboriginal*. But what does this mean in the context of the Canadian Constitution? What is it that compels recognition of these collectivities as holders of particular rights, and distinguishes them from other elements of the Canadian “multicultural mosaic?” The answer lies in the salient aspects—the origins, the functioning—of the common law doctrine of Aboriginal rights.<sup>12</sup> This doctrine long pre-existed the enactment of s. 35, and the relevance of the *Constitution Act, 1982* is not that it created, recognised or affirmed any new rights, but rather that it strengthened the enforcement of existing ones, by elevating common law Aboriginal rights to constitutional status.<sup>13</sup>

In the end, when one considers the rights s. 35 recognises and affirms in their

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<sup>12</sup> As Slattery has pointed out (*e.g.* in “Understanding”, *supra* c. 1, note 52 at 732, n. 17 and 736-41), the term “common law” in this context refers to a body of unwritten law that is applied in Canadian courts. It does *not* implicate English common law or the common law as contradistinguished from equity.

<sup>13</sup> Although one can identify many failings in the Court’s reasoning in *Van der Peet*, *supra* c. 1, note 28 at para. 28, the Chief Justice did at least expressly, and uncontroversially, acknowledge that analysis of s. 35 ought not to turn on the fact of constitutionalisation. He added (at para. 29):

The fact that aboriginal rights pre-date the enactment of s. 35(1) could lead to the suggestion that the purposive analysis of s. 35(1) should be limited to an analysis of why a pre-existing legal doctrine was elevated to constitutional status. This suggestion must be resisted. The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights; however, the interests protected by s. 35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that legal doctrine now has constitutional status.

historical context, it is clear “Aboriginal” must be understood to mean “of or related to a social order that pre-existed and survived the arrival of the dominant European legal order.” The apparent triteness of this statement is misleading, its simplicity paradoxical. The remainder of this chapter sketches out its foundations, which speak adroitly to the special relationship between the Aboriginal peoples and the Canadian state. In so doing, I draw upon a wealth of authorities that have considered more profoundly the practical origins of Aboriginal rights.<sup>14</sup>

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It is by now well-accepted that the North America encountered by early explorers and colonists was a continent inhabited by Aboriginal *societies*—cultural systems with complete normative (*i.e.* customary, legal) orders governing the relations between individuals, family groupings, and other social units, as well as between the people and their natural environment: the land, animals, *etc.*<sup>15</sup> To this milieu, the Europeans brought

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<sup>14</sup> In particular, this brief overview draws heavily on the work of Jeremy Webber, John Borrows, and Brian Slattery. See especially: “Beyond Regret”, *supra* c. 1, note 46; Webber, “Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples” (1995) 33 Osgoode Hall L.J. 623 [hereinafter “Relations of Force”]; Webber, “The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*” (1995) 17 Sydney L. Rev. 5 [hereinafter “Jurisprudence of Regret”]; Borrows, “A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government” (1992) 30 Osgoode Hall L.J. 291; Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill L.J. 629 [hereinafter “With or Without You”]; Borrows & Leonard I. Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36 Alta. L. Rev. 9; Slattery, “The Hidden Constitution: Aboriginal Rights in Canada” (1984) 32 Am. J. Comp. L. 361; “Understanding”, *supra* note 12; Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) 29 Osgoode Hall L.J. 681; Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71 Can. Bar Rev. 261; Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 Can. Bar Rev. 196 [hereinafter “Making Sense”]. See also Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991).

<sup>15</sup> For a discussion of the spiritual, political, and social conventions that traditionally guided—and continue to guide—Aboriginal peoples in their relations with each other and the environment see especially Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) c. 1 and 2 [hereinafter *Recovering Canada*]. See also Val Napoleon, “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” (Annual Consortium for Democratic Constitutionalism Conference, “Consent as the Foundation for Political Community”, 2 October 2004) [unpublished draft dated 29 September 2004] at 1: “[C]ustomary law inheres in each aboriginal cultural system as a whole,

their own normative conceptions. Hypothetically, had the respective Aboriginal and European normative orders mirrored each other exactly—or had either party entirely abandoned its own in favour of the other’s—there would have been no need for a doctrine of Aboriginal rights. The newcomers would have had immediate knowledge of the relationship between the Aboriginal peoples and their lands; inter-communal disputes, like intra-communal ones, could have been solved on the basis of a common sense of right. As it was, however:

At the moment of their encounter, Aboriginal and non-Aboriginal societies possessed their own sets of norms, each created in ignorance of the other. They constituted autonomous normative universes, without a common justice and indeed without intercommunal norms capable of regulating their relations with each other.<sup>16</sup>

In these circumstances, the maintenance of peace between the native and newcomer societies rested upon the emergence of a common set of basic normative understandings,

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forming legal orders that enable large groups of people to live together and to manage themselves accordingly.”

Judicial recognition of indigenous legal systems can be found as long ago as the early-19th century, in a series of well-known U.S. decisions: see *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 at 146-47, 3 L. Ed. 162 (1810) (*per* Johnson J., dissenting); *Jackson, ex dem. Gilbert v. Wood*, 7 Johns. 290 at 295 (N.Y. Sup. Ct. 1810); *Goodell v. Jackson, ex dem. Smith*, 20 Johns. 693 at 710 (N.Y. Sup. Ct. 1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 at 15-20, 8 L. Ed. 25 (1831) (*per* Marshall C.J.); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 at 542-43, 8 L. Ed. 483 (1832) (*per* Marshall C.J.). This recognition has not been constant or uniform. Hostility was recently and notably seen in *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C. S.C.) [hereinafter *Delgamuukw* (S.C.)] (See also *R. v. Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.)) To its credit, however, the Supreme Court of Canada has done its part to squelch Euro-centric conceptions of the law: see *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 346-47, 34 D.L.R. (3d) 145 [hereinafter *Calder* cited to S.C.R.] (*per* Hall J., dissenting); *Van der Peet*, *supra* note 13 at para. 40 (*per* Lamer C.J.C.), citing *Mabo v. Queensland (No. 2)* (1992), 175 C.L.R. 1 at 58, 107 A.L.R. 1 (Austl. H.C.) [hereinafter *Mabo* (No. 2) cited to C.L.R.] (*per* Brennan J. (later C.J.)); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [hereinafter *Delgamuukw*]; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 at paras. 9, 10 (*per* McLachlin C.J.C.).

<sup>16</sup> “Relations of Force”, *supra* note 14 at 626. See also *RCAP Looking Forward Looking Back*, *supra* note 8 at 100: “[I]n general, contacts between Aboriginal and non-Aboriginal peoples in this part of North America were marked [...] by a mixture of mutual curiosity, halting efforts at friendship and some considerable apprehension. Each side struggled to interpret the behaviour and motives of the other in the light of their respective cultural traditions.” Prior to European arrival, Aboriginal peoples had well-established procedures to govern inter-societal contact with other Aboriginal peoples (see e.g.: “Relations of Force”, *ibid.* at 650; Georges Sioui, *For an Amerindian Autohistory*, trans. by S. Fischman (Montreal: McGill-Queen’s University Press, 1992) at 42), but the particular concern here is the process of normative formation that occurred between the Aboriginal and non-Aboriginal societies—theretofore alien to one another—in the period following contact.

a *modus vivendi*.<sup>17</sup> The most accessible example of this occurrence relates to the contest over land: through a process of continual inter-action and mutual adjustment, the Aboriginal and non-Aboriginal peoples in 17th- and 18th-century eastern North America generated a distinct body of practice requiring formal state acquisition of Aboriginal lands prior to European settlement.<sup>18</sup> Each group's behaviour throughout the formation of these customs was doubtless shaped by its own conception of right, but the result cannot properly be said to have been dictated by the legal system of either: the process was dialogical, not monological.<sup>19</sup> For this reason, detailed analyses of Aboriginal title as a product of British imperial colonial law, while useful for what light they may shed on the British perspective, at best tell only one half of the story.<sup>20</sup>

The land acquisition customs were not universally honoured in practice. Nevertheless, the parties did come to recognise their binding force. When settlers ignored

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<sup>17</sup> This term appears in Webber's work on inter-community relations, and I adopt it from there as a convenient shorthand for the way in which groups cope with living together. See "Relations of Force", *ibid.*; "The Irreducibly Religious Content of Freedom of Religion", in Avigail Eisenberg, ed., *Minorities and Fundamental Freedoms in Canada* (Vancouver: University of British Columbia Press, 2006) [forthcoming].

<sup>18</sup> Given the brevity of this discussion, the generalised "Aboriginal" and "non-Aboriginal" categories naturally conceal much internal difference. I rely again upon "Relations of Force", *ibid.* at 644-51, where Webber investigates the varying practices in New France, New Netherlands, and New England and illustrates that a modicum of uniformity existed between the various colonies relative to land rights. In the end, discussion here centres on British-Aboriginal practice, since it is from this relationship in particular that the Canadian law of Aboriginal rights emerged.

<sup>19</sup> The rules are truly "indigenous" to the relationship between the two: "With or Without You", *supra* note 14 at 634. In Webber's words ("Relations of Force", *ibid.* at 627): "The distinctive norms of each society furnished the point of departure, determining the spirit of interaction, colouring the first interpretations of the other's customs, and shaping the beginnings of a common normative language. But the final product was above all the result of mutual adaptation[.]"

<sup>20</sup> For well-supported analyses of the principles of British law, which generally acknowledge the limited perspective these principles offer, see: Mark D. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 [hereinafter "B.I.C.L."]; Walters, "*Mohegan Indians v. Connecticut* (1705-1733) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785; Walters, "Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23 Queen's L.J. 301; and Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 McGill L.J. 711.

the rules, Aboriginal peoples demanded enforcement and the vindication of their rights.<sup>21</sup> On the British side as well, authorities were concerned with restraining colonists from squatting on or acquiring Aboriginal lands in violation of the norm.<sup>22</sup> And following the conquest of Quebec, the British acted decisively to confirm their commitment to the *modus vivendi*: the *Royal Proclamation* issued by King George III on 7 October 1763 rendered the existing rules of formal purchase in legislative form,<sup>23</sup> emphasising their obligatory force on all colonists within the relevant territories. Again, to be sure, the procedures set out in the *Royal Proclamation* were not always observed, but from the earliest reported decisions in Upper Canada, the judiciary recognised that, to be truly legal, non-Aboriginal settlement had to be preceded by the extinguishment of the Aboriginal peoples' interest in the subject lands.<sup>24</sup>

While the colonial courts may have relied upon the *Royal Proclamation* as positive authority for this principle, it is now widely-accepted that that document does not

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<sup>21</sup> As but one example, see Morrison, *supra* c. 1, note 71 at 27-84, where the author recounts the claims made by the Anishinabek (especially Chief Shingwakance) in the Upper Great Lakes region.

<sup>22</sup> *Ibid.*, especially at 40-42. See also Leslie, *supra* c. 1, note 72 at 15-20 for a more detailed discussion of the Bagot Commission's (grudging) acknowledgement of official practice and its recommendations to combat squatters and trespassers on First Nations lands.

<sup>23</sup> *The Royal Proclamation*, reprinted in R.S.C. 1985, App. II, No. 1 [hereinafter *Royal Proclamation*]. According to a number of sources, a more authoritative transcription of the *Royal Proclamation* may be found in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America, 1603-1783*, repr. (New York: B. Franklin, 1968). On the *Royal Proclamation*'s confirmation of existing colonial practice, see: John Hurley, "Aboriginal Rights, the Constitution and the Marshall Court" (1982-83) 17 R.J.T. 403 at 439; *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 at 746-47, 9 L. Ed. 283 (1835). On its force as a statute, see *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045; *St. Catharines Milling & Lumber Co. v. Ontario (A.G.)* (1887), 13 S.C.R. 577 at 623 (*per* Strong J. (later C.J.C.), dissenting) [hereinafter *St. Catharines Milling*], *aff'd (sub nom. St. Catherine's Milling and Lumber Co. v. Ontario (A.G.))* (1888), 14 App. Cas. 46, 10 C.R.A.C. 13 (H.L.); *R. v. Lady McMaster*, [1926] Ex. C.R. 68; *Calder*, *supra* note 15 at 394-95 (*per* Hall J.).

<sup>24</sup> See *e.g.* *An Act for the Protection of the Lands of the Crown in this Province from Trespass and Injury*, S.U.C. 1839, c. 15; *Little v. Keating* (1842), 6 U.C.Q.B. (O.S.) 265 at 268-69, 1 C.N.L.C. 285. With respect to the sometime divergence between rule and practice, see *Bown v. West* (1846), 1 E. & A. 117 at 118-19, 2 U.C. Jur. 675 (Q.B.), where Chief Justice Robinson noted: "[T]he government has always been desirous to deter and prevent white inhabitants from bargaining with the Indians for the purchase of their lands, though their efforts to that end had been very far from effectual."

represent the only source of authority.<sup>25</sup> What is more, it is also accepted that the acquisition rules provide the framework for Aboriginal title throughout Canada: not just in the east or in the territories described in the *Royal Proclamation*<sup>26</sup> and not simply

<sup>25</sup> For instance, although the Court of Appeal for Ontario (contrary, one notes, to Strong J.'s reasons in *St. Catharines Milling*, *supra* note 23 at 629-35) has held that the operative provisions of the *Royal Proclamation* were repealed by the *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2, so as to nullify the "positive law prescribing the manner in which aboriginal rights could be ceded to the Crown" (*Ontario (A.G.) v. Bear Island Foundation* (1989), 68 O.R. (2d) 394 at 410, 58 D.L.R. (4th) 117 (C.A.), *aff'd* [1991] 2 S.C.R. 570, 83 D.L.R. (4th) 381), it has subsequently glossed this authority by holding that "surrender was [nevertheless] necessary as a result of the established protocol between the Crown and First Nations peoples" (*Chippewas of Sarnia Band v. Canada (A.G.)* (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135 at para. 19 (C.A.), leave to appeal to S.C.C. refused [2001] 3 S.C.R. vi).

<sup>26</sup> Curial opinion was long split as to whether the *Royal Proclamation* applied to B.C. Some judges held it did: see e.g. *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at 636-47, 52 W.W.R. 193 (B.C. C.A.) (*per* Norris J.A.) [hereinafter *White and Bob* cited to D.L.R.], *aff'd* with no comment on this point [1965] S.C.R. vi, 52 D.L.R. (2d) 481; *Calder*, *supra* note 15 at 394-95 (*per* Hall J.); *R. v. Kruger and Manuel* (1974), 51 D.L.R. (3d) 435, [1974] 6 W.W.R. 206 (B.C. Co. Ct.), *rev'd* but not on this point (1975), 60 D.L.R. (3d) 144, [1975] 5 W.W.R. 167 (B.C. C.A.), *rev'd* but not on this point (1977), [1978] 1 S.C.R. 104, 75 D.L.R. (3d) 434. Some remained undecided: *R. v. Dennis and Dennis* (1974), 56 D.L.R. (3d) 379, [1975] 2 W.W.R. 630 (B.C. Prov. Ct.); *R. v. Derriksan* (1975), 60 D.L.R. (3d) 140 at 144, 16 N.R. 233 (B.C. C.A.), *aff'd* with no comment on this point [1976] 2 S.C.R. v, 71 D.L.R. (3d) 159; *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 at 735-36, [1993] 5 W.W.R. 97 (B.C. C.A.) [hereinafter *Delgamuukw* (C.A.) cited to D.L.R.] (*per* Lambert J.A., dissenting). And a large number held that it did not: *White and Bob*, *ibid.* at 620-21 (*per* Sheppard J.A., dissenting); *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485 (B.C. Co. Ct.); *Calder v. British Columbia (A.G.)* (1969), 8 D.L.R. (3d) 59, 71 W.W.R. 81 (B.C. S.C.); *Calder v. British Columbia (A.G.)* (1970), 13 D.L.R. (3d) 64, 74 W.W.R. 481 (B.C. C.A.); *Calder*, *ibid.* at 323, 328 (*per* Judson J.); *R. v. Derriksan* (1974), 52 D.L.R. (3d) 744, 16 N.R. 237 (B.C. S.C.); *R. v. Sparrow*, [1986] B.C.J. No. 2237 (QL) (Co. Ct.); *R. v. Adolph*, [1986] B.C.J. No. 2125 (QL) (Co. Ct.); *Delgamuukw* (C.A.), *ibid.* at 751 (*per* Hutcheon J.A., dissenting in part).

However, the debate over the *Royal Proclamation*'s geographic extent and force, at least as concerns the law of Aboriginal title, is essentially academic. To illustrate, the Court held in *R. v. Sigereak E1-53*, [1966] S.C.R. 645 at 650, 57 D.L.R. (2d) 536 that the *Royal Proclamation* did not, and never did, apply to areas that Charles II purported to grant to the Hudson's Bay Company ("HBC") by Letters Patent in 1670. But in a previous case, the Court approved reasons holding that the geographic scope of the *Proclamation* "is not important because the Government of Canada has treated all Indians across Canada, including those living on lands claimed by the HBC, as having an interest in the lands that required a treaty to effect its surrender" (*R. v. Sikyey*, [1964] 2 C.C.C. 325 at 328, 43 D.L.R. (2d) 150 (N.W.T. C.A.), *aff'd* [1964] S.C.R. 642, [1965] 2 C.C.C. 129). See also *Calder*, *ibid.* at 328 (*per* Judson J.); *R. v. Wesley*, [1932] 4 D.L.R. 774 at 783-87, 26 Alta. L.R. 433 (S.C. (App. Div.)). It should be noted that, even after the Supreme Court of Canada reiterated in two other B.C. cases—*Guerin v. Canada*, [1984] 2 S.C.R. 335 at 376-79, 13 D.L.R. (4th) 321 (*per* Dickson J. (later C.J.C.)) and *Roberts v. Canada*, [1989] 1 S.C.R. 322 at 340, 25 F.T.R. 161—that the *Royal Proclamation* was not the sole fount of Aboriginal title, B.C. courts actually held that neither the *Proclamation* nor the surrender and acquisition practice that it enshrined formed the law of the province: *Delgamuukw* (S.C.), *supra* note 15; *Delgamuukw* (C.A.), *ibid.* at 521 (*per* Macfarlane J.A.), 593-95 (*per* Wallace J.A.). This view has certainly breathed its last, in light of the Supreme Court decision in *Delgamuukw*, *supra* note 15 (see e.g. para. 200 (*per* La Forest J.)). For academic discussion of the *Royal Proclamation* in the B.C. context, see Slattery, "The Legal Basis of Aboriginal Title" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 113 [hereinafter "Legal Basis"] at 121-29.

where colonial or governmental authorities had historically recognised the claimant Aboriginal people's title.<sup>27</sup> In this way, colonial practice in one particular region during one particular time gave rise to a distinct set of legal principles that came to be applied in the remainder of the country.<sup>28</sup>

It is to be noted that this creative, norm-generating process permeated the early Aboriginal/non-Aboriginal relationship. Robert A. Williams, Jr. captures it well in his discussion with respect to treaties:

The parties to a treaty had to agree to create and sustain a *nomos*, a normative universe of shared meanings—"a present world constituted by a system of tension between reality and vision." The smoking of the calumet of peace sought to resolve this tension by invoking the larger forces at work in the affairs of human beings. A treaty sanctified by the smoking of the pipe of peace became, in essence, a sacred text, a narrative that committed two different peoples to live according to a shared legal tradition—an American Indian vision of law and peace.<sup>29</sup>

Williams' work supports the view that both categories of rights enshrined in s. 35(1)—Aboriginal and treaty—find their source in the dynamic interaction of distinct normative systems.

But the continued vitality of Aboriginal societies in the face of European arrival engendered further legal consequences: another rule forged in early colonial practice was

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<sup>27</sup> To borrow Slattery's terms, the doctrine applies automatically and uniformly throughout British colonies: see *e.g.* "Understanding", *supra* note 12 at 737-41; "Making Sense", *supra* note 14 at 199. In practice, not only can Aboriginal title thus be made out in a region in which it is argued that such was not historically recognised (*e.g. Calder, ibid.*; *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385 at para. 49), but Aboriginal peoples can also seek remedies for prior takings of land in violation of these rules. *E.g.* while the Court of Appeal held in *Chippewas of Sarnia Band v. Canada (A.G.)*, *supra* note 25, that the plaintiff Band could not obtain equitable relief declaring its right to lands alienated in violation of the surrender/acquisition practice, it did stress (at para. 8), that its decision did not "touch[] the parts of the claim seeking damages against Canada and Ontario."

<sup>28</sup> As Webber notes in "Jurisprudence of Regret", *supra* note 14 at 21-22, the doctrine "achieved a measure of currency, a measure of generalisability" that has seen its application extended to places as far removed as Africa, New Zealand, and New Guinea, *mutatis mutandis*.

<sup>29</sup> *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997) at 47-48 [footnote omitted, hereinafter *Linking Arms*] (the quoted passage is from Robert M. Cover, "Foreword: *Nomos* and Narrative" (1983) 97 Harv. L. Rev. 4 at 9).

that the respective groups were left unrestrained in their capacity to assert and live by their own, internal normative orders.<sup>30</sup> In this connection, the continuation of the indigenous legal systems did not rely upon any principle of European law, but rather flowed from the central role these systems played in the identities of the Aboriginal peoples who were unwilling to abandon them.<sup>31</sup> The coming of the Europeans did not initially have a substantial impact, for example, on the internal marriage practices of the Plains Cree people; whatever substantive changes might have occurred did not go to negating the Plains Cree's capacity to continue the broader process of interpreting and modifying the specific content of its marital customs over time.<sup>32</sup> As intercourse between the Aboriginal and non-Aboriginal societies increased, the need emerged for some species

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<sup>30</sup> See *Worcester v. Georgia*, *supra* note 15 at 547, where Marshall C.J. stated:

[O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king [...] never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

In this connection, indigenous custom may continue to play a role, where Aboriginal title is made out, in regulating the land interests of a people *inter se*: see "Understanding", *supra* note 12 at 745; Brent Olthuis, "Defrosting *Delgamuukw* (or 'How to Reject a Frozen Rights Interpretation of Aboriginal Title in Canada')" (2001) 12 N.J.C.L. 385 at 410.

<sup>31</sup> See *Recovering Canada*, *supra* note 15 at 27, where Borrows points out that "Aboriginal systems of law can and do operate, with or without the reception of their principles in Canadian courtrooms," and implores First Nations to continue to implement indigenous laws "in family, community, and intra-community disputes." Because of the important role of Aboriginal agency in ensuring the survival of these legal *régimes*, any analysis that relies solely on the "principle of continuity" in British imperial colonial law as an explicator is deficient. As Macfarlane J.A. acknowledged in *Delgamuukw* (C.A.), *supra* note 26 at 518: "No declaration by this court is required to permit internal self-regulation in accordance with aboriginal traditions, if the people affected are in agreement. But if any conflict between the exercise of such aboriginal traditions and any law of the province or Canada should arise the question can be litigated."

<sup>32</sup> There is an important distinction to be drawn here between, on the one hand, particular manifestations of a group's culture at a given point and, on the other hand, the vital and adaptive cultural whole through time. The precise character of a group's normative order may (indeed, almost certainly will) change over time. Sometimes it may change profoundly. The fact that certain changes may have been precipitated or influenced by another group's norms or practices does not in itself speak against the continued existence of the first group's distinct normative system.

of inter-societal recognition of these internal norms. The celebrated *Connolly* case<sup>33</sup> from 1867 provides an excellent example.

*Connolly* concerned the validity, in Lower Canada, of a *mariage à la façon du pays* conducted under Cree custom in the Athabaska Country, between European fur trader William Connolly and Susanne, the step-daughter of a Cree Chief.<sup>34</sup> The marriage would not have been valid under Lower Canadian law because no priest had been present to solemnise the union. After having and raising at least six children with Susanne,<sup>35</sup> and living with her for 29 years in the North West, Connolly purported to marry his second cousin in a Catholic service upon returning to Montreal. Upon the deaths of Connolly and Susanne, their eldest son, John, sued for his share of Connolly's ample estate. In order to adjudicate John's claim, the Quebec courts had to inquire into the relevant Cree customary law,<sup>36</sup> which was proven at trial in the same manner as one would prove

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<sup>33</sup> *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, 11 L.C. Jur. 197 (Sup. Ct.) [hereinafter *Connolly*, cited to R.J.R.Q.], aff'd (*sub nom. Johnstone v. Connolly*) (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Q.B.).

<sup>34</sup> Apparently, Susanne's biological father was French-Canadian: Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Communication Group, 1996) at 186 [hereinafter *RCAP Restructuring the Relationship*].

<sup>35</sup> Including Amelia, the future wife of legendary HBC Chief Factor and Governor Sir James Douglas. As Lady Douglas, Amelia apparently found her brother's lawsuit against Julia Woolrich to be painful and embarrassing (online: <http://collections.ic.gc.ca/helmcken/people/customc.html> (date accessed: 4 May 2005)). For a general discussion of social attitudes towards exogamous unions in B.C., see Renisa Mawani, "In Between and Out of Place: Racial Hybridity, Liquor, and the Law in Late 19th and Early 20th Century British Columbia" (2000) 15 Can. J. L. & Soc. 9.

<sup>36</sup> At trial, Monk J. acknowledged that, regardless of whether English or French law was "received" at the various trading posts in Athabaska Country, the indigenous customs continued in force:

[E]ven admitting, for the sake of argument, the existence, prior to the Charter of Charles, of the common law of France and that of England, at these two trading posts or establishments respectively, yet, will it be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives. [*Connolly*, *supra* note 33 at 84, citing *Worcester v. Georgia*, *supra* note 15.]

foreign law in a typical private international law matter.<sup>37</sup>

For present purposes, *Connolly* illustrates three things of importance: the resilience of the Cree marriage *régime*; the adjustments European traders who lived amongst and intermarried with the Cree people made to this *régime*; and the corresponding necessity for the newcomers' courts to develop a method to recognise Aboriginal laws—to interpret them and to assign them corresponding force under the legal *régime* applicable in the courts—when these were squarely raised in disputes before them.<sup>38</sup> While, traditionally, Canadian courts accepted that properly-enacted legislation could deny recognition to Aboriginal customs, or even outlaw their practice completely,<sup>39</sup> they overwhelmingly attempted to give recognition to Aboriginal custom where such was requested.<sup>40</sup> With the

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<sup>37</sup> The reported judgment of Monk J., *ibid.*, contains a detailed review of the testimony of many European fur traders and missionaries who claimed, through observation over time, a familiarity with the marriage customs of the North Western natives. John Connolly was ultimately successful, convincing the various levels of court that his parents' marriage was valid under the prevailing Cree law, and that he was a legitimate issue of their union under that law. The case was appealed all the way to the Privy Council, but the parties reached a settlement prior to the hearing and the appeal was abandoned.

<sup>38</sup> In this view, as stated *supra* note 31, any element of “continuity” owes its existence largely to factual circumstance and the continued strength of indigenous societies, rather than to the operation of British positive law. In any event, insofar as Aboriginal legal systems were recognised in European courts, the term “continuity” is misleading, if understood strictly: when British or colonial courts or officials were called upon to adjudicate a matter according to the operative Aboriginal law, they had to undertake the effort to comprehend and apply the same. In so doing, they would inevitably engage in “a process of translation and re-expression”: “Beyond Regret”, *supra* note 14 at 64. On occasion, this could prove so challenging a task to the court as to drive it to search for whatever evidence might locate the same legal result in the (to the court) more comfortable confines of Anglo-Canadian law instead: see *Robb v. Robb* (1891), 20 O.R. 591, 3 C.N.L.C. 613 (H. Ct. J. (Com. Pleas Div.)).

<sup>39</sup> Section 3 of *An Act further to amend “The Indian Act, 1880”*, S.C. 1884, c. 27 infamously prescribed that any “Indian or other person” who engaged in, assisted in, or directly or indirectly encouraged the celebration of the potlatch or the Tamanawas dance was “guilty of a misdemeanor, and [...] liable to imprisonment for a term of not more than six nor less than two months in any gaol or other place of confinement[.]” The scope of these bans was enlarged in subsequent legislation: *An Act further to amend the Indian Act*, S.C. 1895, c. 35, s. 6; *An Act to amend the Indian Act*, S.C. 1914, c. 35, s. 8; *An Act to amend the Indian Act*, S.C. 1933, c. 42, s. 10. They were only repealed in 1951: *The Indian Act*, S.C. 1951, c. 29, s. 123(2). For discussions of this legislation, its effects, and Aboriginal resistance thereto, see Backhouse, *supra* c. 1, note 47 at 56-102; Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History, 1998) at 204-05, 268-70; *RCAP Looking Forward Looking Back*, *supra* note 8 at 291-93.

<sup>40</sup> As Lambert J.A. held in *Casimel v. Insurance Corp. of British Columbia* (1993), 82 B.C.L.R. (2d) 387, 106 D.L.R. (4th) 720 at para. 42 (C.A.) [hereinafter *Casimel*]: “[T]here is a well-established body of  
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passage of the *Constitution Act, 1982*, these customs are now protected under s. 35.<sup>41</sup>

This discussion can be extended in general terms to include Aboriginal customs relating to matters such as hunting and fishing. The principles drawn from *Connolly* and the other custom-recognition cases provide an accurate description of the process that

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authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption.” For examples of this recognition process see: *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211, 1 N.W.T.R. (2d) 21 (S.C.) (Aboriginal custom marriage sufficient to establish spousal incompetence to testify but, owing to European prohibition on polygamy, not for second wife); *R. v. Bear's Shin Bone* (1899), 3 C.C.C. 329, 4 Terr. L.R. 173 (N.W.T. S.C.) (polygamous marriage in accordance with Blood Tribe custom was recognised under Canadian law, rendering the accused liable for the offence of polygamy under the *Criminal Code*); *Re Sheran* (1899), 4 Terr. L.R. 83, 3 C.N.L.C. 636 (N.W.T. S.C.) (suggesting that Peigan custom marriage would be recognised where common law marriage *per verba de presenti* would not); *R. v. Williams* (1921), 30 B.C.R. 303, 37 C.C.C. 126 (S.C.) (Aboriginal custom marriage, not yet dissolved in accordance with custom at time to which wife's evidence relates, sufficient to establish spousal incompetence to testify); *Re Noah Estate* (1961), 32 D.L.R. (2d) 185, 36 W.W.R. 577 (N.W.T. Terr. Ct.) (Inuit custom marriage valid for purposes of successions law); *Re Adoption of Katie E7-1807* (1961), 32 D.L.R. (2d) 686, 38 W.W.R. 100 (N.W.T. Terr. Ct.) (Inuit custom adoptions, made by couples married under Inuit custom law, are adoptions “made in accordance with the laws of the Territories”); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479, 67 W.W.R. 669 (N.W.T. Terr. Ct.) (Dogrib custom adoption, recognised under the *Indian Act*, R.S.C. 1952, c. 149, s. 48(16), as am. by S.C. 1956, c. 40, s. 13, is valid under N.W.T. *Child Welfare Ordinance*); *Re Tucktoo and Kitchoolik* (1972), 27 D.L.R. (3d) 225, [1972] 3 W.W.R. 194 (N.W.T. Terr. Ct.), aff'd (*sub nom Re Kitchoolik and Tucktoo*) (1972), 28 D.L.R. (3d) 483, [1972] 5 W.W.R. 203 (N.W.T. C.A.) (Inuit custom adoption, even where challenged by natural parents, is valid); *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743, 8 C.N.L.C. 626 (N.W.T. S.C.) (Dogrib custom adoption valid where Caucasian female petitioner married into and accepted as member by Dogrib Band); *Re Tagornak* (1983), 50 A.R. 237, [1984] 1 C.N.L.R. 185 (N.W.T. S.C.) (Inuit custom adoption valid where Caucasian male petitioner married into and accepted as member of Inuit people); *Casimel, ibid.* (Carrier custom adoption sufficient to bring adoptive parents within definition of “dependent parent” under B.C. *Insurance (Motor Vehicle) Regulations*); *Manychief v. Poffenroth* (1994), 164 A.R. 161, 25 Alta. L.R. (3d) 393 (Q.B.) (spouse from Aboriginal custom marriage recognised as valid under the common law could bring self under Alberta *Fatal Accidents Act* (although no custom proven in that case)); *Re B.C. Birth Registration No. 1994-09-040399* (1998), 45 R.F.L. (4th) 458, [1998] 4 C.N.L.R. 7 (B.C. S.C.) (Aboriginal custom recognised under B.C. *Adoption Act*). But see: *K. (S.K.) v. S. (J.)*, [1999] N.W.T.J. No. 94 (QL) (S.C.) (Aboriginal custom proven, but court declined to grant support order on the basis that territorial legislation authorising the same did not apply to custom adoptions); *Dan (Estate of) v. Dennis* (1983), 51 B.C.L.R. 27, [1984] 2 W.W.R. 449 (S.C.) (parent of child adopted by Carrier custom, but whose adoption has not been validated under statute, does not have the capacity to sue under the B.C. *Family Compensation Act*). Today, the *Indian Act*, *supra* note 4, s. 2(1), as am. by S.C. 1999-2000, c. 12, s. 148(1), specifically defines “child” as including “a child adopted in accordance with Indian custom.”

<sup>41</sup> Slattery, in “What Are Aboriginal Rights?” (“‘Let Right be Done’: *Calder*, Aboriginal Rights and the Treaty Process” Conference, University of Victoria, 13-15 November 2003) [unpublished draft dated 1 July 2005] at 6 [footnote omitted], argues that, as a matter of generic right, “Aboriginal peoples have the right to maintain and develop their distinctive systems of customary law, within an all-embracing federal framework that features multiple and overlapping legal systems and levels of government.” See also *Delgamuukw* (C.A.), *supra* note 26 at 730 (*per* Lambert J.A., dissenting), 761 (*per* Hutcheon J.A., dissenting in part); *Campbell v. British Columbia (A.G.)* (2000), 79 B.C.L.R. (3d) 122, 2000 BCSC 1123 at paras 83-126; *Mitchell v. M.N.R.*, *supra* note 15 at paras. 10, 61-64 (*per* McLachlin C.J.C.).

unfolds when Aboriginal rights are engaged in opposition to game and fish legislation: in essence, the task for the court becomes to interpret the Aboriginal custom, to determine whether or not the legislative provision at issue infringes this custom, and, if so, to decide if the infringement is justified. The third prong of the *Sparrow* infringement test provides a fine illustration of this point, inasmuch as it provides acknowledgement that Aboriginal rights are not uniquely concerned with priority; *Sparrow* states that an infringement may also occur where the impugned legislative scheme “den[ies] to the holders of the right their preferred means of exercising that right[.]”<sup>42</sup> In other words, s. 35 may be engaged where there is a clash between Aboriginal and non-Aboriginal approaches to an issue such as resource regulation or, stated otherwise, between the types of conduct that are permitted under Aboriginal and non-Aboriginal normative systems. Here, too, through repeated engagement and adjustment, the doctrine of Aboriginal rights serves to mediate between the diverse customs of the respective societies.

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I have engaged in this brief discussion in order to make four points that are of critical importance in seeking an understanding of “Aboriginal” for the purposes of s. 35. First, the doctrine of Aboriginal rights requires, as a condition precedent to its application, the existence of competing conceptions of the appropriate normative order.<sup>43</sup> As a

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<sup>42</sup> *Sparrow*, *supra* note 1 at 1112. *Sparrow* concerned the Musqueam Indian Band’s Indian Food Fishing Licence and, more specifically, whether or not the net length restriction contained therein was constitutionally deficient. The Court did not decide the issue on the record, but remitted it back to trial.

<sup>43</sup> Again, if Aboriginal fishing or hunting customs mirrored exactly those of non-Aboriginal society, or had the Cree marriage customs in *Connolly*, *supra* note 33, overlapped perfectly with those of Catholic Quebec, the doctrine of Aboriginal rights would be superfluous. In recognition of this point, see *Cheslatta Carrier Nation v. British Columbia* (2000), 80 B.C.L.R. (3d) 212, 2000 BCCA 539 at para. 18, where, holding that the plaintiff’s suit for a declaration of Aboriginal fishing rights ought to be struck for a lack of “live controversy,” Newbury J.A. stated that Aboriginal rights “cannot be properly defined separately from the limitation of those rights. The latter are needed to refine and ultimately define the former[.]”

practical matter, this cannot but occur in an inter-societal context, which explains why Aboriginal rights are by nature collective.<sup>44</sup>

Second, there is no justification for privileging the date of contact as the time at which a specific set of Aboriginal rights arises.<sup>45</sup> On one hand, it is not merely the fact of indigenous occupation prior to contact that explains the doctrine of Aboriginal rights. Indeed, Justice Judson's now famous statement in *Calder*—" [T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means[.]"<sup>46</sup>—acknowledges not only the Aboriginal peoples' prior occupation of what is now Canada but also, crucially, that these peoples represented distinct normative orders with which the newcomers had to reconcile. The fact that European arrival and concepts such as "time immemorial" are often used as reference points must not obscure the inquiry. The notion of "effective European control" (employed in *Powley*) would seem to capture much more accurately and pragmatically the nature of Aboriginal rights, since it places emphasis on the period in which substantial normative conflict was liable to arise. In this, however, it

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<sup>44</sup> Notwithstanding that many Aboriginal rights can be exercised by individuals, there is no doubt but that they are *collective* rights: *Calder*, *supra* note 15 at 355 (*per* Hall J., citing *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 402-04); *Sparrow*, *supra* note 1 at 1112; *Van der Peet*, *supra* note 13 at paras. 41 (*per* Lamer C.J.C.) and 274, 299 (*per* McLachlin J. (now C.J.C.)); *R. v. N.T.C. Smokehouse Ltd.*, *supra* c. 1, note 18 at paras. 94-95 (*per* McLachlin J.); *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [hereinafter *Gladstone*] at para. 170 (*per* McLachlin J.); *R. v. Adams*, *supra* c. 1, note 29 at para. 22 (*per* Lamer C.J.C.); *Delgamuukw*, *supra* note 15 at para. 115 (*per* Lamer C.J.C.); *R. v. Sundown*, *supra* c. 1, note 63 at para. 36; *Mitchell v. M.N.R.*, *supra* note 15 at para. 132 (*per* Binnie J.); *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85 at para. 42 (*per* Iacobucci J.); *R. v. Blais*, [2003] 2 S.C.R. 236, 2003 SCC 44 at para. 34; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55 at para. 36. Ontario cases subsequent to *Powley* have rejected Métis rights claims owing to the accused's failing to show a relevant rights-bearing community: *R. v. Manners*, [2005] O.J. No. 2214 (QL) (Ct. J.) (in respect of the Windsor region); *R. v. Burns*, [2005] O.J. No. 2215 (QL) (Ct. J.) (in respect of the Brockville region).

<sup>45</sup> Lamer C.J.C. identified "contact" as the relevant time frame in *Van der Peet*, *ibid.* at paras. 60-61.

<sup>46</sup> *Calder*, *supra* note 15 at 328. This statement was later paraphrased in *Van der Peet*, *ibid.* at para. 30, and identified as the basis for *all* Aboriginal rights (not just title).

makes little sense to focus upon the particular customs that prevailed in the Aboriginal collectivity at any historical moment. It is rather the existence of competing normative orders at or around a certain time that matters: neither the Aboriginal nor the non-Aboriginal collectivity should be presumed or expected to have remained static since that time.

In this connection, one perceives that the situation of the Métis is not, as sometimes suggested,<sup>47</sup> entirely dissimilar from that of the other Aboriginal peoples. The Métis emerged as a distinctive people in the Canadian West prior to large-scale European settlement,<sup>48</sup> living according to their own distinctive customs. The arrival of greater

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<sup>47</sup> See, e.g. *Powley* (S.C.C.), *supra* note 11 at para. 17: “The purpose of s. 35 as it relates to the Métis is [...] different from that which relates to the Indians or the Inuit.” See also: *Van der Peet*, *ibid.* at para. 67; Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) at 216, 247; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 9. This presumption of Métis exceptionality, which may exhibit itself in scepticism towards Métis claims, may also mask an impoverished view of “Aboriginality”. For example, in his highly regrettable reasons in *Sawridge Band v. Canada* (1995), [1996] 1 F.C. 3 at 32, [1995] 4 C.N.L.R. 121 (T.D.) [hereinafter *Sawridge Band* cited to F.C.] (ultimately overturned for reasonable apprehension of bias), Muldoon J. stated, parenthetically:

([The phrasing of s. 35(2)] sounds curious since the Métis can hardly be thought of as “Aboriginal”, having been a people only since the advent of the European people and then called “half-breeds” because of their mixed ancestry. The constitution makers indulged in history’s revision here.)

See also *ibid.* at 40-41, where Muldoon J. adopts a similarly derogatory tone.

<sup>48</sup> In “Dispossession”, *supra* note 5 at 460-62, Chartrand provides a pithy synopsis of the emergence of the Red River Métis as a new people. He addresses, *inter alia*, the alliance that formed between the French-speaking *Métif* and the English-speaking “half-breeds”. On that topic, see also Irene M. Spry, “The métis and mixed-bloods of Rupert’s Land before 1870” in Peterson & Brown, *supra* c. 1, note 26, 95; *RCAP Looking Forward Looking Back*, *supra* note 8 at 151; Giokas & Chartrand, *supra* note 11 at 85-87. With respect to when the Métis emerged as the “New Nation”, opinion varies, and it is doubtful that one can give any precise answer. The Battle of Seven Oaks in 1816 is often cited (*RCAP Looking Forward Looking Back*, *ibid.*). Some historians point to the 1849 trial of Pierre Guillaume Sayer (a summary of which is found in *RCAP Perspectives and Realities*, *supra* note 7 at 221) as the crucible. Other writers state that the “mixed-blood” population present in the Red River area had already emerged as a distinct people prior to the Battle of Seven Oaks: John E. Foster, “Some questions and perspectives on the problem of métis roots” in Peterson & Brown, *ibid.*, 73 at 81. Still others assert that it was the introduction of settlers during HBC’s first attempt to establish a Red River settlement in 1812 that provided the catalyst transforming a “mild awareness” of Métis distinctness “into conviction”: Olive P. Dickason, “From ‘One Nation’ in the Northeast to ‘New Nation’ in the Northwest: A look at the emergence of the métis” in Peterson & Brown, *ibid.* 19 at 30-31. Larry N. Chartrand, in “The Definition of Métis Peoples in Section 35(2) of the

(cont’d)

numbers of non-Aboriginal persons created a situation of conflict with the Métis way of life, motivating the Métis to set up a provisional government in 1869 and to negotiate with Ottawa for the Red River area's entry into Canada. In a manner roughly analogous to the treaty-making process, the Métis traded their military authority for the promise of a land base in the new province.<sup>49</sup> Given such important commonalities with the other Aboriginal peoples, there is no reason in principle why the unique ethnogenesis of the Métis people ought to preclude a theory of Aboriginal rights that encompasses all of the peoples mentioned in s. 35(2).<sup>50</sup>

Third, since the doctrine arises from the dynamic interaction of distinct normative

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*Constitution Act, 1982*" (2004) 67 Sask. L. Rev. 209 at 218-21 provides a summary of recent historical scholarship (including that of Foster), placing the birth of Red River Métis identity between 1770 and 1812.

<sup>49</sup> For a summary of the events leading to and following the *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 31, reprinted in R.S.C. 1985, App. II, No. 8, see *RCAP Perspectives and Realities*, *ibid.* at 222-27. See also "Dispossession", *ibid.*, where the author provides cogent reasons why the implementation of that provision was unconstitutional and notes that Canada also promised the Métis that those engaged in resisting its authority in 1869 would be given amnesty. Litigation alleging that various federal and provincial enactments illegally deprived the Métis of lands and other rights promised under the *Manitoba Act, 1870* has been pending since the 1980s: in *Dumont v. Canada (A.G.)*, [1990] 1 S.C.R. 279, 65 Man.R. (2d) 182, rev'g (1988), 52 D.L.R. (4th) 25, 52 Man.R. (2d) 291 (C.A.), aff'g (1987), 48 Man.R. (2d) 4, (*sub nom. Manitoba Métis Federation Inc. v. Canada (A.G.)*) [1987] 2 C.N.L.R. 85 (Q.B.), the Court dismissed a motion to strike the pleadings. Subsequently, the Court of Appeal ordered the plaintiffs to particularise each and every Métis person in respect of whom they alleged an interest in land was not conveyed as promised or was later stripped: *Dumont v. Canada (A.G.)* (1991), 75 Man.R. (2d) 273, 91 D.L.R. (4th) 654 (C.A.), rev'g (1990), 71 Man.R. (2d) 199 (Q.B.). More recently, the court granted the plaintiffs leave to amend their Statement of Claim (*Manitoba Métis Federation Inc. v. Canada (A.G.)*, [2002] M.J. No. 57, 2002 MBQB 52), noting that the parties still had significant historical and genealogical research to conduct before trial could commence, and made an order that the Manitoba Métis Federation could adequately represent all the plaintiffs (*Manitoba Métis Federation Inc. v. Canada (A.G.)*, (2003), 172 Man.R. (2d) 205, 2003 MBQB 40).

<sup>50</sup> The various First Nations have vastly differing cultures, histories, and experiences in dealing with the newcomers, but no one invokes this as an obstacle to the laying out of general principles. Regarding this point (the search for a "coherent vision" of Aboriginal rights in Canada), see "What Are Aboriginal Rights?", *supra* note 41, in which Slattery argues convincingly that even the divergent "specific rights," which are determined by factors unique to each Aboriginal people and which often take on highly particularised forms (Slattery's example is the Heiltsuk people's right to sell herring spawn on kelp, affirmed in *Gladstone*, *supra* note 44), emerge from more general rights that are common to all Aboriginal peoples. In this vein, I have chosen the *Powley* proceedings as a case study *not* because it raises issues specific to Métis rights, but because it happens to problematise this broader s. 35 issue that has not yet, in my opinion, garnered the attention that it merits. The non-exceptionality of the Métis is also at issue in, e.g.: Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36 Alta. L. Rev. 180; and Albert Peeling & Paul L.A.H. Chartrand, "Sovereignty, Liberty, and the Legal Order of the 'Freemen' (Otipahemsu'uk): Towards a Constitutional Theory of Métis Self-Government" (2004) 67 Sask. L. Rev. 339.

systems, there is no basis upon which to require that a right exhibit some essential “Aboriginal” quality: in principle, it should be enough to establish that it arises from the need to reconcile norms of non-Aboriginal and Aboriginal *peoples*.

Finally, the inter-societal source of Aboriginal rights brings particular emphasis to the indispensable role and continual engagement of Aboriginal agency. The participation of Aboriginal peoples in the development of the law was not limited to the initial generation of the doctrine, but also its survival and subsequent enshrinement in the Constitution. In spite of the oppressive legislation and policies of successive governments, the Aboriginal peoples of Canada continue to assert and live according to their distinctive legal systems; as collectivities, they continue to represent a fundamental aspect of identity for many persons. Collective resistance to initiatives such as the Trudeau government’s “White Paper,”<sup>51</sup> along with court challenges such as *Calder*, has helped to re-generate a once-moribund Aboriginal/non-Aboriginal dialogue, ultimately leading to the inclusion of Aboriginal rights in the *Constitution Act, 1982*.<sup>52</sup>

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<sup>51</sup> Canada, Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (“The White Paper”) (Ottawa: Queen’s Printer, 1969). Tim Schouls, John Olthuis & Diane Englestad sum up the White Paper in “The Basic Dilemma: Sovereignty or Assimilation,” in Englestad and J. Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord: Anansi, 1992) 12 at 20: “[T]he government was convinced that the focus by native groups on their ethnicity was a negative response to their sense of exclusion, which could be better addressed through ‘equality’ and ‘liberty’.” For examples of resistance, see: Harold Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: M.G. Hurtig, 1969); Indian Association of Alberta, *Citizens Plus: A Presentation by the Indian Chiefs of Alberta to Right Honourable P. E. Trudeau, Prime Minister, and the Government of Canada* (“The Red Paper”) (Edmonton: The Association, 1970).

<sup>52</sup> Douglas Sanders provides a history of the various drafts of the new Constitution, and the involvement of the various national Aboriginal organisations, in “The Rights of the Aboriginal Peoples of Canada” (1983) 61 Can. Bar Rev. 314 [hereinafter “Rights”]. See also: Noel Lyon, “An Essay on Constitutional Interpretation” (1988) 26 Osgoode Hall L.J. 95 at 99-103; *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] Q.B. 892, [1982] 2 All E.R. 118 (C.A. (Civ. Div.)). In “The Search for a Constitutional Accord—A Personal Memoir” (1982-83) 8 Queen’s L.J. 28 at 67, the Hon. R. Roy McMurtry, then Attorney General for Ontario (now Chief Justice of Ontario), revisits the November 1981 decision that temporarily removed Aboriginal rights from the “patriation package,” which he characterises as having occurred in response to initial opposition to the clause from Aboriginal organisations. See also Thomas R. Berger, *One Man’s Justice: A Life in the Law*

This realisation assists us in comprehending s. 35 as an agreement—a deal—between the Aboriginal and non-Aboriginal peoples of Canada, in which the parties have undertaken to re-structure their relationship.<sup>53</sup> This does not involve the wholesale creation of a theoretical “social contract,” but rather is an agreement in the sense that, as the product of negotiations between representatives of the broad societies involved, the parties have accepted that the relationship going forward will be better served by a return to the principles that animated the *modus vivendi* of the past.<sup>54</sup> “We are,” in the pithy words of Chief Justice Lamer, “all here to stay,”<sup>55</sup> and the Canadian state acknowledges this in its pledge to bind itself to respect the norms of honourable conduct that facilitated settlement and the foundation of the country.<sup>56</sup>

In brief, Aboriginal rights are rooted in the reality that the indigenous peoples and non-indigenous Canadian society are bound together in a special relationship. This

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(Vancouver: Douglas & McIntyre, 2002) at 146-64 for the author’s remarkable account of the fall-out from his public criticism, while a sitting judge, of the November 1981 decision.

There is a more recent example that disproves the cynical view that Aboriginal peoples are perpetually without a voice, and the legislatures are perpetually without ears. Experience with the proposed *First Nations Governance Act*, *infra* c. III, note 19—which, in the face of vehement Aboriginal opposition, then Liberal Party leadership hopeful Paul Martin Jr. promised to, and ultimately did, let die upon his assuming the leadership of the government—not only illustrates a highly effective mobilisation of dissent, but also highlights that the legislative process can be sensitive to non-majoritarian positions.

<sup>53</sup> See Lyon, *ibid.* at 100: “[T]he context of 1982 is surely enough to tell us that [s. 35] is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”

<sup>54</sup> With respect more generally to the notion that a better justice might be achieved through a return to the past, see “Jurisprudence of Regret”, *supra* note 14; “Beyond Regret”, *supra* note 14. Webber’s concept of “regret”, which he develops primarily in the Australian Aboriginal context, does not imply a one-sided benevolence, but rather describes a process—spurred by the persistence and reassertion of indigenous peoples and autonomous indigenous legal orders—“in which we [collectively] reform our sense of justice in order to overcome what now seems to be a fundamental defect in our society’s constitution.” (“Jurisprudence of Regret”, *ibid.* at 11 [footnote omitted].)

<sup>55</sup> *Delgamuukw*, *supra* note 15 at para. 186.

<sup>56</sup> “Relations of Force”, *supra* note 14 at 654-55. See also Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” (1996) 34 Osgoode Hall L.J. 101 at 108-12. Section 35 ensures that the common law rules are no longer subject to being overridden by ordinary statute.

relationship can variously be described as “jurisdictional”, “federal” or “political”.<sup>57</sup> Each of those terms in my opinion goes to illustrate the fundamental point: that s. 35 singles out collectivities because of their connection to the normative orders that preceded those of the European settler communities. The doctrine of Aboriginal rights serves to mediate the parties’ separate “claims, interests and ambitions.”<sup>58</sup>

The word “Aboriginal,” then, should not be taken to speak to the specific content of any given norm (on a “micro” level), but rather must be understood as a reference to entire cultural systems (from a “macro” perspective) that maintained their viability in the face of those that were subsequently introduced and came to dominate in Canadian society. In the following chapter, I consider how the law ought to approach its task of identifying which groups fit this conception of “Aboriginal.”

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<sup>57</sup> Indeed, in a previous work I chose to describe Aboriginal rights as “political rights”: see Olthuis, *supra* note 30 at 411 and works cited thereat.

<sup>58</sup> The phrase in quotations is taken from the very recent *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1 [hereinafter *Mikisew*]. In *Mikisew*, Binnie J. began his judgment with the lucid observation: “The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”

### III. The Constitution's Peoples: Possible Approaches

How, then, do we identify Indian, Inuit, and Métis groups for the purposes of the Constitution? A number of commentators examined s. 35(2) in the period leading up to and shortly following patriation of the Constitution, largely to state that the inclusion of the Métis would have an effect on the interpretation of the guarantee in s. 35(1).<sup>1</sup> By implication, one might almost presume that legal references to the Indian and Inuit peoples are, in relative terms, fairly straightforward. Of course, this is not at all the case. Notoriously, there is one understanding of what "Indian" means in s. 91(24) of the *Constitution Act, 1867*<sup>2</sup> (where it includes the Inuit<sup>3</sup> and may also include the Métis<sup>4</sup>),

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<sup>1</sup> As examples of these sorts of early discussions of s. 35(2), see e.g.: "Rights", *supra* c. II, note 52 at 332; Douglas E. Sanders, "Aboriginal Peoples and the Constitution" (1981) 19 Alta. L. Rev. 410 at 418-22; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Supreme Court L.R. 255 at 260-62 [hereinafter McNeil 1982]; McNeil, "The *Constitution Act, 1982*, Sections 25 and 35" [1988] 1 C.N.L.R. 1 at 4-5 [hereinafter McNeil 1988]; William Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982: Part II: Section 35: The Substantive Guarantee" (1988) 22 U.B.C. L. Rev. 207 at 260-77; Bell, *supra* c. II, note 6; Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498 at 504.

<sup>2</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Originally the *British North America Act, 1867* (the "*B.N.A. Act*"), the statute was renamed the *Constitution Act, 1867* by Item 1 of the Schedule to the *Constitution Act, 1982*, *supra* c. I, note 13.

<sup>3</sup> Reference as to whether the term "Indians" in head 24 of section 91 of the *British North America Act, 1867*, includes Eskimo inhabitants of the Province of Quebec ("*Re Eskimos*"), [1939] S.C.R. 104, [1939] 2 D.L.R. 417.

<sup>4</sup> See e.g. Bell, *supra* note 1; *RCAP Looking Forward Looking Back*, *supra* c. I, note 72 at 256; Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the *British North America Act, 1867*" (1978-79) 43 Sask. L. Rev. 37; Bradford W. Morse & Robert K. Groves, "Métis and Non-status Indians and Section 91(24) of the *Constitution Act, 1867*" in Chartrand, *supra* c. II, note 10 at 191; Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, looseleaf ed. (Scarborough, ON: Carswell, 1997) at 27-4. See also *R. v. Alphonse* (1993), 83 C.C.C. (3d) 417 at 454, 80 B.C.L.R. (2d) 17 (*per* MacFarlane J.A.) (C.A.). If correct, this view could potentially render Alberta's *Metis Settlements Act*, R.S.A. 2000, c. M-14, as am. by S.A. 2004, c. 25 and Saskatchewan's *The Métis Act*, S.S. 2001, c. M-14.01, *ultra vires*. For a contrary view, see Schwartz, *supra* c. II, note 47 at 227-47. (I note that Schwartz's contribution amounts to an "original intent"-type of argument, an attempt to glean what the drafters of the *B.N.A. Act* would have intended by choosing the words they did. The relevant passage appears to have been written as a response to Chartier, *ibid.* and like that author, Schwartz uses *Re Eskimos*, *ibid.*, as a template for discussion.)

If the federal government does have legislative authority over matters relating to the Métis people, it has yet to exercise it. Although Canada established the office of the Federal Interlocutor for Métis and Non-Status Indians in 1985, currently, the *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6 declares that the federal Minister of Indian Affairs' "powers, duties and functions" extend to all parliamentary matters relating, *inter alia*, to "Indian affairs" (s. 4(a)) and "Inuit affairs"

another in the main legislative instrument of federal Indian policy enacted pursuant to that power,<sup>5</sup> another in the *Natural Resource Transfer Agreements* (“NRTAs”) incorporated in the *Constitution Act, 1930*,<sup>6</sup> and yet another in the *Constitution Act, 1982*.<sup>7</sup> Equally, there is no set understanding, for the purposes of Canadian law, as to what identifies the Inuit

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(s. 4(c)), but it is silent as to the Métis. See also *R. v. Grumbo* (1998), 168 Sask.R. 78, 159 D.L.R. (4th) 577 (C.A.), in which the provincial Crown conceded, for the purposes of the trial only, that s. 91(24) included the Métis; the federal A.G., meanwhile, declined even to participate in the trial. More recently, where the provincial Crown made the same concession, in *R. v. Laviolette*, 2004 SKPC 102, aff’d (2005), 260 Sask.R. 121, 2005 SKQB 61, the court dismissed the accused’s application to adduce evidence on the issue notwithstanding.

<sup>5</sup> The *Indian Act*, *supra* c. I, note 4, s. 4(1) expressly excludes the Inuit from the ambit of the statute. As well, besides dealing with individual entitlement to registration—indeed, partially through that registration process (see discussion below at 76-80)—the Act asserts a particular conception of Indian collectivities (s. 2(1), *s.v.* “band”): see generally Larry Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (Scarborough, ON: Carswell, 1996).

<sup>6</sup> The NRTAs for the Prairie provinces are appended as Schedules (1) to (3) of the *Constitution Act, 1930* (U.K.), 20-21 Geo. V, c. 26, reprinted in R.S.C. 1985, App. II, No. 26. Each of these documents contains an identical provision as follows:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

A series of cases have elaborated on the meaning of this wording. The right guaranteed in the “proviso” applies to “Indians who, at any particular moment, happen to be found within the boundaries of the Province [...], irrespective of normal residence”: *Frank v. R.* (1977), [1978] 1 S.C.R. 95 at 101, 75 D.L.R. (3d) 481. The reference to “Indians” includes “non-treaty Indians” as that term was defined in the *Indian Act*, R.S.C. 1927, c. 98, s. 2(h): *R. v. Ferguson*, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct. (Crim. Div.)), aff’d [1994] 1 C.N.L.R. 117 (Alta. Q.B.). However, notwithstanding whether or not the s. 91(24) reference to “Indians” includes the Métis, the NRTA reference to “Indians” does not include the Métis as a group: *R. v. Blais*, *supra* c. II, note 44 (basing this conclusion on the particular historical context of the NRTAs). This conclusion, though, is complicated by the fact that there may be individual members of Prairie Métis organisations who would fall within the “non-treaty Indians” category in the 1927 legislation! (I am grateful to my supervisor Paul L.A.H. Chartrand for drawing my attention to this last point.) See also Lionel Chartrand, “Are Metis Persons ‘Indians’? Challenging Manitoba’s *Natural Resources Transfer Agreement*” (2004) 67 Sask. L. Rev. 235.

<sup>7</sup> *Supra* note 2. Since s. 35(2) of the newer Act, unlike s. 91(24) of the older, differentiates the Indian and Inuit peoples, the meaning of “Indian” in the newer provision must be narrower: McNeil 1988, *supra* note 1 at 4. It is equally clear that the “Indian” peoples in s. 35(2) are not merely the sum total of all *Indian Act* bands. While modern *Indian Act* bands may form rights-holding communities for the purposes of s. 35 (see discussion *infra* note 19), the two do not overlap completely; there are First Nations collectivities that hold rights under s. 35 but that are not bands under the statute—for example, the Innu of Labrador. Moreover, “non-Status Indians” are included in s. 35(2) as well: *R. v. Chevrier*, [1989] 1 C.N.L.R. 128 (Ont. Dist. Ct.) [hereinafter *Chevrier*]; *R. v. Fowler* (1993), 134 N.B.R. (2d) 361, [1993] 3 C.N.L.R. 178 (Prov. Ct.); *R. v. Harquail* (1993), 144 N.B.R. (2d) 146 (Prov. Ct.).

as a people.<sup>8</sup> Here again, one must resist making what is a common assumption: that the Métis present so distinct a case as to implicate discrete issues that have little purchase *vis-à-vis* the other Aboriginal peoples.<sup>9</sup>

So, then, what qualities must a collectivity exhibit in order to be recognised under s. 35? To get at this foundational issue, and correspondingly to enable us to reconsider what, substantively, the constitutional promise ought to entail, we need to inquire critically into the competing conceptions of Aboriginal peoplehood that may obtain in Canadian law (of which there are several). That is the focus of this chapter.

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One extreme position—that peoplehood is contingent upon statutory or executive recognition—can be easily dismissed. Here, I am alluding to the simple enumeration, by Parliament or the executive, of specific groups as holders of s. 35 rights: *e.g.* as Parliament authorises the Governor-in-Council to declare certain groups subject to the *Indian Act* (a process which is itself mired in controversy<sup>10</sup>). Admittedly, this is not the

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<sup>8</sup> The *Indian Act*, *supra* note 5, s. 4(1), in excluding the Inuit from its reach defines them as a distinct racial collective (“the race of aborigines commonly referred to as Inuit”). Likewise, much of the evidence marshalled by the federal government in *Re Eskimos*, *supra* note 3, rested on alleged racial distinctions between the First Nations and the Inuit: see Backhouse, *supra* c. 1, note 47, c. 2 (“Race Definition Run Amuck: ‘Slaying the Dragon of Eskimo Status’ in *Re Eskimos*, 1939”) at 18-55. The Court, however, ultimately relied upon historical evidence—in which the Inuit were considered as a distinct “Indian” tribe—as indicative of the intention of the framers of the Constitution. The tribal rationale reveals an entirely different conception of Inuit peoplehood. (For a summary of governmental efforts at identifying individual Inuit persons, see Canada, Indian and Northern Affairs, *Identification and Registration of Indian and Inuit People* (Ottawa: Minister of Indian Affairs and Northern Development, 1993) at 23-29.)

<sup>9</sup> It has been held in at least one recent case—*R. v. Acker* (2004), 281 N.B.R. (2d) 275, 2004 NBCP 24—that the three-part test from *Powley* (S.C.C.) (see *supra* c. 1, note 62 and accompanying text), applies in respect of “Indian” peoples as well. Although I do not endorse all of the particular criteria from *Powley*, it is in my opinion the correct view that the same test ought to apply across all groups in s. 35.

<sup>10</sup> *Indian Act*, *supra* note 5, ss. 2(1) (*s.v.* “band”(c)), 4(2), 6(1)(b). This power was exercised, for example, in the *Order Declaring a Body of Indians at Conne River, Newfoundland to be a Band of Indians for Purposes of the Act*, S.O.R./84-501 (now *Miawpukek Band Order*, S.O.R./89-533) in respect of a Mi’kmaq group that had established in Newfoundland and that was in the process of suing the federal government for a declaration that it should be recognised as a band. (In *Joe v. Canada*, [1986] 2 S.C.R. 145, 69 N.R. 318, *aff’d* (*sub nom. Conne River Band v. Canada*) (1983), 49 N.R. 198, [1984] 1 C.N.L.R. 96

only (or even most obvious) way in which a statutory recognition scheme might function: I shall discuss a more ostensibly “objective” approach (which would cover, *e.g.*, a legislative attempt to set indicia of peoplehood that groups must meet in order to be recognised) separately, below.

At the outset, it bears reminding that as a technical matter of law, pure statutory recognition would violate the elementary principle of constitutional law that prohibits Parliament from controlling the meaning of terms used in the Constitution. Prior to the 1982 patriation, the federal power to legislate with respect to “Indians, and Lands reserved for the Indians”<sup>11</sup> did not carry with it the capacity to define (*i.e.* limit) the scope of these terms, because the *B.N.A. Act*, being a statute of the imperial Parliament at Westminster, was only susceptible to amendment by that body.<sup>12</sup> To be sure, the Canadian Parliament remained competent to create whatever legislative categories it

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(F.C.A.), it was held that the Federal Court had no jurisdiction to hear the same group’s application for a second declaration, to the effect that its lands constituted an Indian reserve.) Contrarily, it has pointedly *not* been exercised in respect of the Namaygoosisagagun/Collins First Nation, located near Lake Nipigon in north-western Ontario, which is a member nation of the Chiefs of Ontario (which provides co-ordinated political leadership for 134 First Nations in the province) and the Union of Ontario Indians (founded in 1949 as a political advocate and secretariat for 42 First Nations of the Anishinabek Nation), but is not recognised as an *Indian Act* band by the federal government. The Assembly of First Nations (“AFN”) takes the position that the Namaygoosisagagun/Collins First Nation is a rights-holding entity under s. 35(1), and has called on the government to recognise it. See Assembly of First Nations, Special Chiefs Assembly, Resolution 108, *Political Support for the Namaygoosisagagun/Collins First Nation* (7, 8, 9 December 2004), online: AFN <<http://www.afn.ca/article.asp?id=232>> (date accessed: 15 August 2005).

<sup>11</sup> Head 24 of s. 91 in the then *B.N.A. Act*, *supra* note 2.

<sup>12</sup> While the *Statute of Westminster, 1931* (U.K.), 22 Geo. V, c. 4 rendered imperial statutes in principle amendable by ordinary Act of the Canadian Parliament or any provincial legislature, this did not extend to the various *British North America Acts, 1867 to 1930*, by virtue of s. 7(1) (repealed insofar as it applies to Canada by Item 17 of the Schedule to the *Constitution Act, 1982*, *supra* note 2). See, on this point, Slatery, “The Independence of Canada” (1983) 5 Supreme Court L.R. 369 at 393-96. Any desire to amend the Act necessarily required making a petition to Westminster: see *Reference re Resolution to amend the Constitution* (the “*Patriation Reference*”), [1981] 1 S.C.R. 753 at 831, 125 D.L.R. (3d) 1, where Martland and Ritchie JJ.—dissenting, but not on this point—held that Canadian sovereignty required that the Acts *not* be amended by Westminster except with Canadian consent (an assertion that they showed was borne out by practice). See generally Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) 36 McGill L.J. 308 at 311; Kenneth Lysyk, “The Unique Constitutional Position of the Canadian Indian” (1967) 45 Can. Bar Rev. 513 at 515, n. 5; Sanders, *supra* note 1 at 420; Pentney, *supra* note 1 at 262.

wished for the purposes of implementing specific governmental programmes,<sup>13</sup> but it could not accomplish what would in effect be a unilateral amendment of the imperial statute by, for example, disclaiming its jurisdiction with respect to the Inuit people.<sup>14</sup>

All the more, since the “recognition and affirmation” of Aboriginal and treaty rights in the *Constitution Act, 1982*,<sup>15</sup> it clearly does not lie in any legislature’s hands to reserve these rights to select groups: any such attempt would offend against the rights of those peoples omitted and would be invalid.<sup>16</sup> It would be utterly incompatible with the obligations inherent in s. 35. Moreover, as described in the previous chapter, the doctrine of Aboriginal rights was born in, and finds continued sustenance from, the reconciliation of inter-societal normative difference. From a purely practical perspective, this is not something that one party to the relationship can unilaterally will out of existence, by legislative fiat or otherwise.

This raises a related point, being how to account for the historical effects of statutory recognition. Aboriginal nations (unlike *Indian Act* bands) existed long prior to

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<sup>13</sup> On this point generally, see Sanders, *ibid.* at 421; Hogg, *supra* note 4 at 27-4. The latter puts it starkly: “Parliament is, of course, under no obligation to legislate to the full limit of its authority.” This may be generally true, but subsequent to 1982 must be accompanied by at least one *caveat*: once Parliament *does* exercise its legislative power, it cannot do so in an unconstitutionally under-inclusive manner (compare *Vriend v. Alberta*, [1998] 2 S.C.R. 493, 212 A.R. 237 and *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37) or indeed in any discriminatory manner that offends s. 15(1) of the *Charter* (*Corbiere*, *supra* c. 1, note 75). Moreover, in the particular Aboriginal context, in light of s. 35 and recent “positive” obligations that the Court has placed on governments (see *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 [hereinafter *Haida*]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74 [hereinafter *Taku River*]; *Mikisew*, *supra* c. II, note 58), it could be the case that Parliament *is* bound by certain duties to legislate.

<sup>14</sup> See *Re Eskimos*, *supra* note 3. Nor, I suggest, should Parliament have been able—via the *Indian Act*, *supra* note 5—to restrict its jurisdiction to certain First Nations, and this for the same reason. But see *Canada (A.G.) v. Lavell* (1973), [1974] S.C.R. 1349 at 1359, 38 D.L.R. (3d) 481 [hereinafter *Lavell*] (*per* Ritchie J.).

<sup>15</sup> *Supra* note 2, s. 35(1).

<sup>16</sup> *Ibid.*, s. 52(1) declares the Constitution of Canada to be “the supreme law” and states that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” It is thus even more eminently clear since 1982 that Parliament has no competence to define terms used in the Constitution: McNeil 1982, *supra* note 1 at 261; McNeil 1988, *supra* note 1 at 4.

European arrival, and it was the former whose interactions with the newcomers gave rise to the doctrine of Aboriginal rights. This fact has prompted one judge recently to suggest that “a distinction must be made between an aboriginal community to which there may be aboriginal entitlements and a Band” and that “[t]he scheme of the *Indian Act* may be said to be in conflict with some Aboriginal rights of some communities.”<sup>17</sup> The pillars of that argument, in fact, would appear relatively solid: the various indigenous nations each held an inherent right to self-define and set their own rules of membership; the operation of the successive *Indian Acts* has not extinguished this right,<sup>18</sup> but has clearly and unjustifiably infringed it.<sup>19</sup> Taken to an extreme, the argument might be said to support the position that *Indian Act* bands, as statutory creations, are not entities that are capable of exercising Aboriginal rights.<sup>20</sup>

However, we should guard against a peremptory denial of history. One has to

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<sup>17</sup> *Perron v. Canada (A.G.)* (2003), 105 C.R.R. (2d) 92, 32 C.P.C. (5th) 165 at para. 22 (Ont. Sup. Ct. J., per C. Campbell J.).

<sup>18</sup> *Sparrow*, supra c. 1, note 6 at 1091, holds that “an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982.” The *Indian Act* legislation, despite its long pedigree, has not extinguished the inherent right because it exhibits no “clear and plain intention” to do so (*ibid.* at 1099).

<sup>19</sup> The history of the *Indian Act*, supra note 5 is well-known. The effects of the Act, of course, continue. Moreover, recently, the federal government under Prime Minister Chrétien proposed changes to the Act by way of the *First Nations Governance Act*, initially introduced as Bill C-61, 1st Sess., 37th Parl., and re-introduced after prorogation as Bill C-7, 2nd Sess., 37th Parl. The Bill was excoriated by many First Nations leaders as a further and unjustifiable imposition upon Aboriginal norms and values. It never reached second reading. For an academic assessment of the Bill’s failings, see John Borrows, “Stewardship and the *First Nations Governance Act*” (2003) 29 Queen’s L.J. 103. See also: *Federation of Saskatchewan Indian Nations v. Canada* (2003), 230 F.T.R. 29, 2003 FCT 306 [hereinafter *Sask. Indian Nations*]; *Saskatchewan First Nations and Indian Bands v. Canada*, [2003] F.C.J. No. 1262 (QL), 2003 FC 998 (T.D.) [hereinafter *Sask. First Nations*]; *Treaty Seven First Nations v. Canada (A.G.)* (2003), 230 F.T.R. 53, 2003 FCT 327 [hereinafter *Treaty 7 Nations*], all these being cases in which Aboriginal entities sued for alleged governmental breaches of duty owing to the manner in which it introduced the legislation into Parliament.

<sup>20</sup> This is seemingly what Steele J. meant when he stated in *Ontario (A.G.) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 at 365, 15 D.L.R. (4th) 321 (H. Ct. J.) [hereinafter *Bear Island* (H. Ct.)] that the Defendants’ “claim relates to aboriginal rights of the group that is entitled to them, that is, [the Teme-agama Anishnabay Tribe], which it is alleged is a much larger group than the registered band. [...] In this case, if there are valid aboriginal claims, then they belong to the [Teme-agama Anishnabay Tribe] and not the registered band.”

accept that the legislation has had a significant impact upon the present constitution of many collectivities; for example, the statutory band structure may have entirely superseded a people's traditional institutions. In instances like this, it is exceedingly difficult to identify a modern successor to the original First Nation apart from the *Indian Act* band. As deplorable as the *Indian Act* impositions have been, the changes they have effected may only be reversible at great cost and upheaval to the peoples themselves.<sup>21</sup> In this connection, we ought not to imply that there existed a pristine form of pre-contact "Aboriginality," of which a community might have been despoiled through legislative transformation.

Consider the *Oregon Jack Creek Indian Band v. C.N.R.* litigation. In that case, the Chiefs of numerous bands in the British Columbia interior brought a representative action to restrain the defendant railway company from "double tracking" portions of its line along the Thompson River. The Chiefs relied in part upon claims of Aboriginal title. When the railway challenged their authority to bring the action on behalf of the band members, the Chiefs sought to amend their pleadings so that the relief was claimed not only on behalf of the members of the bands, but also on behalf of the members of the three nations that occupied the river system when the Crown first asserted sovereignty

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<sup>21</sup> This issue lurks behind the "Paradox of *Indian Act* Reform" as discussed in *RCAP Looking Forward Looking Back*, *supra* note 4 at 258-59. Borrows captures this spirit wonderfully (*Recovering Canada*, *supra* c. II, note 15 at 105-06 [footnotes omitted]):

...Raven watches as the Indians clearly reject Trudeau's speech. They do not want the government to repeal the *Indian Act*, despite its repression. He loves this; he knew they were just like him, paradoxical. They want to retain the very legislation that colonized them because they say it recognizes their special status. This is exactly how Txeemsim would have planned it. Raven smiles to himself, thrusts out his chest, and puffs up feathers. But he notices that the Prime Minister's speech has served as a rallying point for many Aboriginal groups. They want change, but they do not trust the government to bring it about without abrogating their rights.

over the province.<sup>22</sup> The motions judge's refusal to grant the amendments was overturned on appeal. For the court, Macfarlane J.A. wrote:

In my opinion, the date at which it must be shown that there was an organized society occupying the specific territory over which the plaintiffs, as descendants of the members of that society, now assert aboriginal title is the date at which sovereignty was asserted by the Europeans. The society need not have been what we now regard as a legal entity, and *the descendants of that society need not, in order to have status to bring an action, prove that such a legal entity now exists.*<sup>23</sup>

This portion of the *Oregon Jack* case would support the notion that a group, which happens to be an *Indian Act* band, ought not to be precluded from asserting and exercising

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<sup>22</sup> For example, the amended pleadings would have identified the first plaintiff as claiming on behalf of the members of the Oregon Jack Creek Band and "all other members of the Nlaka'pamux Nation." See *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, [1988] B.C.J. No. 879 (QL) (S.C.), supp. reasons at [1988] B.C.J. No. 3062 (QL) (S.C.), rev'd (1989), 34 B.C.L.R. (2d) 344, 56 D.L.R. (4th) 404 (C.A.), rev'd [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607 (motion for rehearing dismissed [1990] 1 S.C.R. 117, 68 D.L.R. (4th) 478) [hereinafter *Oregon Jack*].

<sup>23</sup> *Ibid.* (C.A.) at 352 (B.C.L.R.) [emphasis added]. Here, Macfarlane J.A. adopted the court's reasoning in *Baker Lake (Hamlet of) v. Canada (Minister of Indian Affairs and Northern Development)* (1979), [1980] 1 F.C. 518 at 559, 107 D.L.R. (3d) 513 (T.D.) [hereinafter *Baker Lake* cited to F.C.]. In that case, after holding that Aboriginal title claimants had to prove "[t]hat they and their ancestors were members of an organized society" that occupied the claimed lands prior to asserted English sovereignty, Mahoney J. held:

The organized society of the Caribou Eskimos, such as it was, and it was sufficient to serve them, did not change significantly from well before England's assertion of sovereignty over the barren lands until their settlement. For the most part, the ancestors of the individual plaintiffs were members of that society; many of them were themselves members of it. *That their society has materially changed in recent years is of no relevance.* [Emphasis added.]

Accordingly, Macfarlane J.A. held (*Oregon Jack* (C.A.), *ibid.* at 353 (B.C.L.R.)) that the nations were capable of definition in a sufficiently clear manner so as to enable the Chiefs' representative action: "[I]t is sufficient that the Indians be able to prove that there was an organized society occupying the specific territory over which the Indians, as descendants of the members of that society, now assert aboriginal title based on the title that existed at the date that sovereignty was asserted by the Europeans." But see *R. v. Charlie*, 2005 BCPC 57, [2005] 2 C.N.L.R. 316, where a similar argument failed on evidentiary grounds. The accused in *Charlie* was a member of the Chehalis Band. The Band held an Aboriginal Communal Fishing Licence that would not have permitted Charlie to fish on the day in question. Charlie argued that his conduct was permitted under the Aboriginal rights of the Stó:lo people. Young Prov. Ct. J. noted that Charlie had called no expert witnesses to define the Stó:lo as an Aboriginal people. He concluded (at para. 129):

I am not satisfied that the Stó:lo have been clearly defined as a distinctive Aboriginal group. Mr. Hall described the political nature of the Stó:lo Nation and the Stó:lo Tribal Council. The Stó:lo Nation is an incorporated society. Likewise, the Stó:lo Tribal Council is a political entity. While the defence evidence makes extensive reference to the Stó:lo people, that particular group was never clearly defined as a distinctive Aboriginal group. Nor was the evidence clear as to what makes Chehalis band members part of the Stó:lo, assuming Stó:lo are defined as a distinctive Aboriginal group.

the s. 35 rights of its pre-*Indian Act* predecessor(s).<sup>24</sup> It follows—paradoxically, but in my view not contradictorily—that an *Indian Act* band might invoke its status under the legislation as the foundation for its ability to exercise constitutional rights, then employ those rights in an attack on the constitutionality of that same legislation! Such an instance has in fact occurred.

Shortly after the adoption of Bill C-31,<sup>25</sup> representative actions were brought on behalf of six bands in Alberta seeking a declaration that the legislation infringed s. 35 and was of no force or effect. The Crown sought to strike the Statement of Claim, amongst other reasons, for the fact that the individual plaintiffs had no standing to sue on behalf of all the members of the various bands: by virtue of the Bill C-31 changes, the bands included the very people whose band membership the action sought to challenge. Strayer J. (later J.A.) held:

[I]t is entirely appropriate that the other members of the band other than the “returnees” introduced by virtue of the 1985 amendments should be joined as plaintiffs in a class action under Rule 1711. Basically, aboriginal rights are communal rights and it is therefore appropriate that those persons who claim to belong to the relevant community to which the right adheres should be joined as plaintiffs in an action to vindicate those rights: see *Attorney-General for Ontario v. Bear Island Foundation et al.* (1984), 15 D.L.R. (4th) 321 (Ont. H.C.), at pages 331-332. It is fundamental to the case of the plaintiffs that the aboriginal right in question here – the right of each band to control its own membership – is one which adheres to the group as it was constituted before the coming into force of the amendments on April 17, 1985. The plaintiffs are certainly entitled to frame their action on that basis and it will remain to be seen whether they can make out their case in fact or in law. If they are able to do so, it will emerge that the bands as they describe them in the amended statement of claim are the legal bands. In effect the applicant is contending that they should not be allowed to sue on this basis because they may not succeed in their action. This is a circular argument which might itself be characterized as frivolous or vexatious.<sup>26</sup>

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<sup>24</sup> It should be noted that the Supreme Court of Canada, in dismissing the motion for a rehearing (*supra* note 22), characterised this portion of the Court of Appeal’s judgment as *obiter*.

<sup>25</sup> *Supra* c. 1, note 4.

<sup>26</sup> *Twinn v. Canada* (1986), [1987] 2 F.C. 450 at 462-63, 6 F.T.R. 138 (T.D.). The *Sawridge* litigation is now nearly twenty years old: a 1995 trial decision dismissing the Band’s case was overturned

There is no incoherence in acknowledging the historical role of legislation in the construction of the modern people, but simultaneously accepting (in fact, encouraging) the modern people's ability to seek liberation from the imposed *régime* through their own devices.<sup>27</sup> What is of utmost importance for the purposes of s. 35 is the group's ongoing role in providing a normative framework to its members. This cannot merely be legislated into or out of existence.

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Let us consider, then, the diametrically opposed situation, in which a group's outward manifestation of peoplehood is taken as sufficient to prove the same. Under this view, if a group were to declare its status as a people or nation and correspondingly insist on being recognised as such, it would be improper for persons outside the professed collectivity to pass judgment on the group's declaration or, for that matter, to do anything but accede to the demand for recognition. This resembles—and indeed in some respects

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on appeal for reasonable apprehension of bias and a new trial was ordered: see *Sawridge Band*, *supra* c. II, note 47, rev'd for reasonable apprehension of bias and new trial ordered [1997] 3 F.C. 580, 215 N.R. 133 (C.A.). Most recently, the Crown was successful in its pursuit of an interlocutory mandatory injunction to force the Sawridge Band to add the names of eleven elderly women to the Band List: see *Sawridge Band v. Canada*, [2003] 4 F.C. 748, 2003 FCT 347, aff'd [2004] 3 F.C. 274, 2004 FCA 16.

<sup>27</sup> Canadian courts now accept that *Indian Act* bands are capable of suing and being sued in a number of civil contexts (see *King v. Gull Bay Indian Band* (1983), 38 C.P.C. 1 (Ont. Dist. Ct.); *Kucey v. Peter Ballantyne Band Council* (1987), 57 Sask.R. 29, [1987] 3 W.W.R. 438 (C.A.); *Clow Darling Ltd. v. Big Trout Lake Band* (1989), 70 O.R. (2d) 56, [1990] 4 C.N.L.R. 7 (Dist. Ct.); *Horseman v. Horse Lake First Nation* (2005), 361 A.R. 287, 2005 ABCA 15), although, in accordance with the previous understanding of bands as unincorporated associations, representative actions remain common (see *Mintuck v. Valley River Band* (1977), 75 D.L.R. (3d) 589, [1977] 2 W.W.R. 309 (Man. C.A.); *Springhill Lumber Ltd. v. Lake St. Martin Indian Band* (1986), 43 Man.R. (2d) 271 (C.A.); *Clayoquot Band of Indians v. British Columbia* (1986), 3 B.C.L.R. (2d) 60, (*sub nom. Martin v. British Columbia*) [1986] 3 C.N.L.R. 84 (S.C.)); *Bannon v. Pervais* (1989), 68 O.R. (2d) 276, [1990] 2 C.N.L.R. 17 (Dist. Ct.)). With respect to claims for Aboriginal and treaty rights, the notion that bands are appropriate rights-holding entities finds support in: *Simon* and the other cases cited *supra* c. 1, note 63; *Oregon Jack*, *supra* note 22; *Powley* (C.A.), *supra* c. 1, note 18 at para. 145; *Powley* (S.C.C.), *supra* c. 1, note 54 at para. 29. In *Corbiere*, *supra* note 13 at paras. 75-78, L'Heureux-Dubé J., concurring, canvassed a number of the most significant aspects of the *Indian Act régime*, adding that "as a practical matter, representation of Aboriginal peoples in processes such as land claims and self-government negotiations often takes place through the structure of *Indian Act* bands" (*ibid.* at para. 78). The same point was essentially made by McLachlin and Bastarache JJ. (*ibid.* at para. 17), for the majority.

may be the logical extension of—the proposition that one ought to defer to a group’s assessment of its membership; here, however, deference purports to occur one step prior. It is still a question of a people’s right to define itself, but instead of its being embodied in an assertion, on behalf of an acknowledged people, of control over membership, it is a call on behalf of a would-be membership to be acknowledged as a people—with all of the resulting appurtenances.<sup>28</sup>

A declaration of peoplehood will often provide cogent evidence that the group in question does in fact merit the designation. That is, without having to adopt the view that this type of subjective manifestation is the very *raison d’être* of the people (*i.e.* “We think we are a rights-holding people, therefore we are.”), one must nevertheless take notice that the individuals concerned have exhibited a strong belief that they, for reasons that lie behind the assertion, form a particular and unique collective. I include in this discussion the situation in which persons come together in a representative association, such as OMAA and the MNO: these organisations do perform a significant declaratory function and, as the various courts ruled in *Powley*, while their existence might not by itself provide sufficient proof of community, the fact of their establishment—and the level of importance that their members attribute to them—can give a strong indication of the sort

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<sup>28</sup> This is not to suggest that it is always easy to maintain a distinction between the two; there is something of a “chicken and egg” syndrome operating here. For instance, testifying at the *Powley* trial as to the existence of a Métis community in Sault Ste. Marie, Tony Belcourt stated: “[O]ur right as a people is the right to define who we are.” (See *Powley* Transcript, vol. 1 (27 April 1998) at 73 (Belcourt examination-in-chief).) In context, this might suggest either: (a) that the Métis Nation has an inherent right to describe its own geographical extent; (b) that the Métis Nation has an inherent right to govern its membership; or (c) that the members of the Sault Ste. Marie community have an inherent right to assert their own peoplehood. Likewise, the issues can collapse together in the face of definitional ambiguities. The Grand Council of the Crees, in *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec* (Nemaska, *Eeyou Astchee*, QC: Grand Council of the Crees, 1995), review a number of disparate opinions about the possible existence and scope of a Québec “people,” concluding at 29 that: “The above ambivalence is not to deny that the Québec people constitutes a people (it is up to Quebecers to define themselves).” [Footnote omitted.]

of subjective connections that sustain important social groups.<sup>29</sup>

In principle, a declaration ought to be given a lot of weight. Indeed, it might even be argued that giving effect to an express demand for recognition provides the only way to avoid unduly colouring the matter with the vagaries of power. I do agree (and argue below) that peoplehood must have an intrinsically subjective aspect. But when it comes down to it, the notion that a group could unilaterally declare peoplehood, and that this alone would bind others to treat it as such, is all too subjectivist, too reliant upon the authority of the speaker.

There are, in my view, at least two basic weaknesses in an approach of pure deference. The first relates to the fact that some groups might advance questionable claims. There are two dimensions to this concern: one is symbolic and the other is material. Consideration of certain events following the 1999 Supreme Court decision in *Marshall (No. 1)*<sup>30</sup> will help to illustrate. In that case, the Court recognised a limited Mi'kmaq treaty right to trade in the products of traditional fishing and hunting activities. When, in the wake of the judgment, Mi'kmaq persons in places like Esgenoôpetitj (Burnt Church, New Brunswick) attempted to start up lobster fisheries during a period that was closed to non-Aboriginals, they were met with utter hostility. The situation descended into pandemonium, beginning with the destruction of property and continuing with threats—and then actual occasions—of physical violence, and remained a fixture in

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<sup>29</sup> See above, c. 1, at 21-25. While a rights-claimant surely cannot stand solely on his or her membership in an organisation as evidence of membership in a rights-bearing people (*R. v. Norton* (2005), 263 Sask.R. 128, 2005 SKPC 46), the existence of the organisation hints, *prima facie*, at the presence of a “critical mass” of persons, sufficient to form a community.

<sup>30</sup> *R. v. Marshall* (“*Marshall (No. 1)*”), [1999] 3 S.C.R. 456, 178 N.S.R. (2d) 201.

nightly newscasts across the country for some time.<sup>31</sup>

In the midst of all this, a number of ostensible Aboriginal organisations popped up in New Brunswick, issuing cards that professed to grant membership in rights-bearing communities.<sup>32</sup> Before long, persons hunting on the authority of these cards were apprehended by provincial conservation officers, with many of these cases proceeding to trial.<sup>33</sup> Generally, the accused individuals were able to provide evidence of self-identification as Aboriginal persons (although recent), Aboriginal ancestry (although distant), and community acceptance (by the card-granting body). In none of the cases, however, did the court find that the alleged communities actually had the claimed s. 35(2) status.<sup>34</sup>

Something on an intuitive level makes it hard to quibble with the conclusions reached in these cases. In fact, with respect to one of the groups alleged in court to

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<sup>31</sup> The situation got so bad that the Court saw fit to clarify the scope of the judgment in detailed *per curiam* reasons issued to dismiss a motion for a rehearing, and a stay of judgment pending the same, by an intervener in the case, the West Nova Fisherman's Coalition: *R. v. Marshall* ("*Marshall (No. 2)*"), [1999] 3 S.C.R. 533, 179 N.S.R. (2d) 1. Each of the following are extraordinary occurrences: that the Court considered the motion, given that it was brought by an intervener; that it provided written reasons for rejecting it; and that the full panel of judges who heard the original case (with the exception of Cory J., who had retired in the interim) sat again on the motion.

<sup>32</sup> Prior to the decision, in Nova Scotia and New Brunswick, there already existed: the Union of Nova Scotia Indians (representing Mi'kmaq persons registered under the *Indian Act*, *supra* note 5); the Native Council of Nova Scotia (Mi'kmaq/Aboriginal persons living off reserve, whether registrable or not, and affiliated with CAP); the Union of New Brunswick Indians (Mi'kmaq and Maliseet registered under the *Indian Act*); and the New Brunswick Aboriginal Peoples Council (off reserve persons of Aboriginal ancestry, affiliated with CAP). Some of the new groups included the "Acadian Métis-Indian Nation," the "East Coast First Peoples Alliance," and the "Rising Sun Community Restigouche West/*Communauté Soleil Levant*".

<sup>33</sup> *R. v. Chiasson (O.)* (2001), 239 N.B.R. (2d) 1, 2001 NBPC 5, *aff'd* 12 March 2002 (Q.B.); *R. v. Castonguay (J.-D.)* (2002), 254 N.B.R. (2d) 213, 2002 NBPC 26; *R. v. Castonguay (R.)* (2002), 257 N.B.R. (2d) 67, 2002 NBPC 31, *aff'd* (2003), 265 N.B.R. (2d) 105, 2003 NBQB 325; *R. v. Daigle (D.)* (2003), 258 N.B.R. (2d) 120, 2003 NBPC 4, *aff'd* (2004), 271 N.B.R. (2d) 382, 2004 NBQB 79; *R. v. Castonguay (D.)* (2003), 271 N.B.R. (2d) 128, 2003 NBPC 16; *R. v. Chiasson (O.)* (2004), 270 N.B.R. (2d) 357, 2004 NBQB 80; *R. v. Hopper (R.)* (2004), 275 N.B.R. (2d) 251, 2004 NBPC 7.

<sup>34</sup> *R. v. Chiasson (O.)* (2001), *ibid.* at paras. 13-14; *R. v. Castonguay (J.-D.)*, *ibid.* at para. 59; *R. v. Castonguay (R.)* (2002), *ibid.* at para. 52; *R. v. Castonguay (D.)*, *ibid.* at para. 51; *R. v. Hopper (R.)*, *ibid.* at para. 10.

represent a Métis community—the “Rising Sun Community Restigouche West/*Communauté Soleil Levant*”—the papers filed upon registration of the society’s name made no mention whatsoever of a Métis connection.<sup>35</sup> More to the point, the evidence simply did not indicate that the groups in question held the kind of sway over, or assumed the level of importance in the lives of, their members that one expects in matters that are so fundamental to identity. In this respect, had the courts (or, prior to that, the conservation officers) acceded to the declarations of peoplehood in the membership cards, they would have conveyed a message that peoplehood could reside in the proffered thin and ephemeral connections. However, an ebbing tide, so to speak, lowers all boats. The result would be to devalue and disrespect the extent to which Aboriginal collectivities, generally, fundamentally shape and nourish their members’ identities—much in the same way as if we were to intimate that peoplehood were a mere award.<sup>36</sup> It would have a concomitant effect on the manner in which non-Aboriginal persons perceive the Aboriginal peoples, likely skewing discourse and contributing to exacerbated conflict between the two.

Moreover, s. 35 recognition also has an inescapably material aspect. The constitutionalisation of Aboriginal rights has, amongst other things, “sanctioned

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<sup>35</sup> See *R. v. Castonguay (J.-D.)*, *ibid.* The form in question required the applicant to declare the type of business activity or service that would be carried on under the registered name. The response read: « Exploitation forestière et pêche » [“Forestry and fishing”]. Contrast this to the Be-Wab-Bon Métis and Non-Status Indian Association and the Bonnechere Métis Association, appellants in *Lovelace v. Ontario*, *supra* note 13, which incorporated as non-profit service organisations for the express purpose of creating an “organizational voice for [the] community” (*ibid.* at para. 11)—*viz.* to represent specific Métis interests.

<sup>36</sup> My comments here should be taken as limited to what the reported decisions in the New Brunswick cases reveal about the strength of the evidence presented: this is not intended to be a judgment of the groups in the absolute. I do not discount the possibility that better evidence might exist that the organisations actually represent rights-bearing peoples, nor do I wish to deny that such instances might involve issues of real individual and group identity. In this last regard, it is instructive to contrast the results in the cases discussed in the present section (which turn on the absence of a rights-holding community), and that in *R. v. Lavigne* (2005), 283 N.B.R. (2d) 298, 2005 NBPC 8 [hereinafter *Lavigne*], which turned on individual membership in a recognised rights-holding Mi’kmaq community.

challenges to social and economic policy objectives embodied in legislation,”<sup>37</sup> and affirmed a general priority in resource allocation in respect of groups that are in the minority.<sup>38</sup> Acceptance of every assertion of peoplehood would tend to increase the number of parties with constitutional priority over resources. This could, for reasons that are quite apparent, be expected to heighten tensions between Aboriginal and non-Aboriginal parties. Equally, it could inure to the detriment of other Aboriginal peoples.<sup>39</sup> The game, fish, and forestry resources that are the subject of many Aboriginal rights are—while renewable—finite at any particular time (to say nothing of the land that may be subject to a claim for Aboriginal title). Especially in a relatively confined geographical area over which Canadian law has recognised the rights of one people, the “arrival” of another on the scene introduces competition that will require adjustments on the part of the prior rights-holders. These are sensitive issues even in cases where the assertion of peoplehood is widely-accepted (as the *Powley* case itself illustrates), and would be most concerning where it were not.

The successive *Powley* decisions were hailed by Ontario’s Métis organisations as

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<sup>37</sup> *Sparrow*, *supra* note 18 at 1110.

<sup>38</sup> In *Sparrow*, *ibid.* at 1116, the Court held that any allocation of priorities in the B.C. fishery, once valid conservation measures were met, must give “top priority” to Musqueam food fishing rights. Subsequently, in *Gladstone*, *supra* c. II, note 44 at para. 62 (*per* Lamer C.J.C.), the Court confirmed that, even where the Aboriginal right has no “internal limitation,” government must demonstrate that it has allocated resources procedurally and substantively “in a manner respectful of the fact that [Aboriginal] rights have priority over the exploitation of the fishery by other users.” In such a case, the Aboriginal right will not be *exclusive*, but it will maintain priority over other claims.

I should point out as well that by using the phrase “in the minority,” I am making a mere observation that non-Aboriginal persons outnumber Aboriginal persons. I am aware that many Aboriginal persons take exception to usage of the term “minority rights” in respect of what are more properly called “national rights.” See *e.g.* Phil Fontaine & Dianne Corbiere, “A supreme test of inclusion” *The Globe and Mail* (11 August 2005) A15: “Indigenous peoples aren’t minorities – we’re social and political nations with a unique, distinct place in Confederation as the first peoples of this land.” As my thesis should go to prove, I am in agreement.

<sup>39</sup> I am much indebted to my late colleague Perry Shawana for bringing this point to my attention in an earlier presentation of my thoughts on the topic. His insightful commentary on that occasion and others was always constructive, and will be missed.

unbridled victories against intransigent governmental policies. But the case had broader implications than just this. It also ushered in a new relationship between the Métis of the Upper Great Lakes and the Anishinabek (Ojibway) people whose Aboriginal and treaty rights in the area were never in doubt. Anishinabek leadership has been supportive of the Métis cause,<sup>40</sup> but because Anishinabek rights would be affected by any post-*Powley* agreement between the Métis and the Ontario government, the then Anishinabek Grand Council Chief, Vernon Roote, insisted on being party to negotiations. All indications are that the Métis interlocutors welcomed Anishinabek participation, and that the parties' interests were closely aligned. But when it appeared, subsequent to the Court of Appeal for Ontario's ruling, that that the Métis were prepared to exercise their rights in the absence of a settled regulatory *régime*—*i.e.* if no agreement could be reached—Grand Council Chief Roote expressed trepidation about any course of action that would extend rights, or impinge upon Anishinabek rights, without an all-party agreement in place.<sup>41</sup> The point is this: parties with established rights, investing them with priority over resource allocation, will be required to make adjustments—perhaps significant ones—in the face of newly-recognised groups with similar entitlements. Strains may be inevitable, even where the first party maintains close relations with the newly-recognised one and acknowledges the justice of its claim.<sup>42</sup> The recognition of Aboriginal peoples on less

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<sup>40</sup> Good relations between the Anishinabek and Métis of the Upper Great Lakes continue to this day: see Métis Nation of Ontario, "Sacred Pipes of the Métis, Anishinabek to come together", online: MNO <[http://www.metisnation.org/news/05\\_june\\_anishnabek.html](http://www.metisnation.org/news/05_june_anishnabek.html)> (date accessed: 14 August 2005).

<sup>41</sup> See Bob Goulais, "Métis, Anishinabek united in call for negotiations" (24 April 2001), online: Union of Ontario Indians <<http://www.anishinabek.ca/uoi/po052401.htm>> (date accessed: 10 March 2005). I note as well that there has been some friction between the Labrador Métis Nation and the Innu of Labrador over issues of "Aboriginality."

<sup>42</sup> Again, there is an analogue here to issues of membership. Alfred, *supra* c. 1, note 47 at 166-68 details how the Mohawks of Kahnawá:ke (similar to the Sawridge Band discussed *supra* note 26) perceived (cont'd)

defensible assertions would naturally cause much more consternation amongst the already-recognised peoples in close proximity.

The second set of basic deficiencies in a purely deferential approach flows from the manner in which verbal assertions are typically made: through individuals recognised or putting themselves across as community leaders. If we argue that these persons' declarations should be taken as sufficient to prove s. 35 peoplehood, we preclude even the most cursory observation of the actual collectivity. We make no account for analysis of the state of affairs "on the ground." Granted, we must take declarations of peoplehood seriously, but does it not make sense to retain some capacity for critical perspective? This is especially important in light of the fact that leadership and decisions taken by leadership are often contested. In fact, a policy of recognising all claims of peoplehood could tend, in cases where there is substantial dissent, towards an artificial fracturing of collectivities that once were whole or, equally importantly, subtly inter-connected.

At the most basic level, deference to each and all outward declarations of peoplehood would be open to abuse. Hypothetically, in a dramatic case, this might occur through a gerrymandering of the collectivity. Those making the declaration of peoplehood might seek to define the people in a manner that eliminates challenges to their authority, or other elements that they find threatening or undesirable. I note in passing that this example underscores something that runs throughout this thesis: the essential inter-dependence between the notions of peoplehood and group membership: just as the criteria governing how persons adhere to a group necessarily bespeaks a particular

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the Bill C-31 initiative in a negative light, fearing that "the heavy influx of new Indians would place an unbearable strain upon the resources and land bases of established Indian communities."

conception of the nature of the group,<sup>43</sup> a declaration of “group-ness” comprises an understanding of the characteristics shared by its members.<sup>44</sup>

But the situation need not reach that extreme in order to have deleterious effects. In the best of cases, a bare declaration of peoplehood can only but crudely approximate the elusive associations that forge community; in other circumstances, it may set in train a process of attrition that ruptures many of those associations. That is, to recognise all outward assertions of peoplehood would be to encourage dissident groups, unhappy with their leadership’s approach in respect of a certain rights issue, to “break off” and assert their own right to be considered a rights-bearing people in a way that damages both the original and break-away groups.

In making this point, it must be noted that the processes by which human collectivities coalesce and break apart are complex. We cannot make an *a priori* condemnation of all splits, insisting that they are bound to end badly—it is impossible to cast judgment in such general terms, in part because there is no reason that the status quo should be universally privileged as evidencing the “natural” unit of peoplehood. For example, in its modern incarnation, a people may represent formerly separate groups that circumstances impelled to federate or form an alliance: such unions are not indissoluble by nature, nor are their constituent parts precluded from sometimes acting independently, even in the pursuit of important ends. The Nuu-chah-nulth nations of British Columbia provide an excellent case in point.

Long ago divided into chiefly families, Nuu-chah-nulth persons—sharing traditions,

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<sup>43</sup> *i.e.* Rules of membership will always reveal a particular understanding of what exactly it is that ties a collectivity together.

<sup>44</sup> *i.e.* In making a declaration of peoplehood, a group (or, more accurately, its spokespersons) must somehow define what it is that unites it.

languages, and aspects of culture—came together first in local groups, then as nations. In 1958, the nations formed an alliance; after incorporating, they re-named themselves the Nuuchahnulth Tribal Council (“NTC”) in 1979.<sup>45</sup> In total, fourteen First Nations—all recognised as bands under the *Indian Act*—comprise the NTC, which has a combined population of approximately 7 500;<sup>46</sup> it should be stressed, however, that the formalised structures at the nation and tribal council levels have in no way eliminated the rich ties and specificity that reside in the local.<sup>47</sup>

In 2001, twelve of the NTC First Nations jointly negotiated a draft agreement-in-principle (“AIP”) with the governments of Canada and British Columbia.<sup>48</sup> Following this, each separately undertook a process of community consultation with a view to approving the draft AIP. Ultimately, six First Nations approved the agreement and six rejected it. In the aftermath, five of the nations that had supported the draft AIP split off

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<sup>45</sup> Nuuchahnulth Tribal Council, “Nuuchahnulth Tribal Council Vision and Mission”, online: <<http://www.nuuchahnulth.org/tribal-council/welcome.html>> (date accessed 24 July 2005).

<sup>46</sup> The fourteen First Nations are: Ahousaht, Ditidaht, Ehattesaht, Hesquiaht, Hupacasath, Huu-ay-aht, Ka:’yu:’k’t’h’/Che:k:tles7et’h’, Mowachaht/Muchalaht, Nuchatlaht, Tla-o-qui-aht, Toquaht, Tseshaht, Uchucklesaht, and Ucluelet. See: “Nuuchahnulth Tribal Council Vision and Mission,” *ibid.*; *Band Classification Manual*, *supra* c. II, note 4; B.C. Treaty Commission, “Maa-nulth First Nations”, online: <[http://www.bctreaty.net/nations\\_3/maanulth.html](http://www.bctreaty.net/nations_3/maanulth.html)> (date accessed 24 July 2005) [hereinafter “BCTC”].

<sup>47</sup> The Tribal Council takes pains to emphasise that the path towards broader nationhood has not rendered obsolete the local level. Its website points out that each member nation always “included several local groups, each centred around a ha’wiih (hereditary chief), and each living from the resources provided within their ha’houlthee [*viz.* chiefly territory].” It goes on to state that, “[t]oday, each Nuuchahnulth First Nation includes several chiefly families, and most include what were once considered several separate local groups.” (“Nuuchahnulth Tribal Council Vision and Mission”, *ibid.*) Moreover, the alliance formed in 1958 did not bring an end to the process of change in the constituent bodies: in 1962, the Kyuquot and Checleset Bands amalgamated as the Ka:’yu:’k’t’h’/Che:k:tles7et’h’ First Nations.

<sup>48</sup> At that point, the Ditidaht and Hupacasath First Nations were negotiating independently from the NTC. The former entered the B.C. Treaty Process independently in 1993, having chosen not to participate in the NTC’s treaty negotiations—it has been negotiating at a treaty table with a non-NTC member, the Pacheedaht First Nation. The latter withdrew from the NTC treaty table in 2000. See: British Columbia, Ministry of Aboriginal Relations and Reconciliation, *First Nations and Tribal Councils in the Treaty Process: Ditidaht First Nation*, online: <[http://www.gov.bc.ca/arr/negotiation/first\\_nations\\_in\\_the\\_process/ditidaht.htm](http://www.gov.bc.ca/arr/negotiation/first_nations_in_the_process/ditidaht.htm)> (date accessed: 22 August 2005), and *Hupacasath First Nation (Also Hupaçasath, Hupaçasath; formerly Opetchesaht)*, online: <[http://www.gov.bc.ca/arr/negotiation/first\\_nations\\_in\\_the\\_process/hupacasath\\_map.htm](http://www.gov.bc.ca/arr/negotiation/first_nations_in_the_process/hupacasath_map.htm)> (date accessed: 22 August 2005).

to continue negotiations as the Maa-nulth First Nations (“MFN”), which body represents roughly 2 000 persons.<sup>49</sup> With one exception, the MFN are geographically located around Barkley Sound on the west coast of Vancouver Island.<sup>50</sup> The remaining NTC nations are roughly situated between Kyuquot Sound and Ucluelet on the coast, extending inland some distance as well.<sup>51</sup>

The MFN subsequently negotiated and ratified a modified AIP, and have proceeded to “Stage Five” of the B.C. Treaty Process—effectively, the negotiations to finalise a treaty. The NTC nations are at an earlier stage, collectively pursuing their own AIP. Through this all, however, the members of the MFN have remained full members of the NTC and in fact received approval to pursue these negotiations, at their discretion, in a resolution passed by the NTC.<sup>52</sup> While the NTC no longer serves as the primary locus for treaty negotiations for the member nations of the MFN, it still provides them with a wealth of social programmes and services, as well as other forms of support on the

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<sup>49</sup> Or just over one quarter of the total NTC population. See: Canada, News Release 2-02402, “AIP Signals Progress Toward A Final Treaty” (3 October 2003), online: Indian and Northern Affairs Canada <[http://www.ainc-inac.gc.ca/nr/prs/s-d2003/2-02402\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/s-d2003/2-02402_e.html)>; “BCTC”, *supra* note 46. The five nations negotiating as the Maa-nulth First Nations are: Huu-ay-aht, Ka:’yu:’k’t’h’/Che:k:tl̓es7et’h’, Toquaht, Uchucklesaht, and Ucluelet. For B.C. Treaty Negotiation purposes, the NTC consists of the remaining seven First Nations.

<sup>50</sup> The Ka:’yu:’k’t’h’/Che:k:tl̓es7et’h’ First Nation’s traditional territory is further north, including Kyuquot Sound and the southern half of the Brooks Peninsula.

<sup>51</sup> The MFN and NTC overlap somewhat in their claims (as, indeed, do their constituent nations *inter se*), most significantly involving Effingham Inlet and the Broken Group Islands in Barkley Sound, which according to the MFN AIP form part of the Ucluelet and Uchucklesaht peoples’ lands respectively, but which have also been claimed by the Tseshaht First Nation of NTC affiliation.

<sup>52</sup> The first NTC draft AIP was negotiated in March 2001 and was rejected by the non-MFN peoples shortly thereafter. On 15 May 2001, the NTC passed a resolution allowing the MFN to proceed with their negotiations at their discretion, and enabling the remaining members of the NTC (*i.e.* those nations that had rejected the AIP) to continue to evaluate their options on the negotiating front. Further, some of the MFN peoples sought and reached agreements with NTC member nations regarding overlapping and shared territory, or establishing boundaries between the lands they respectively claimed. See Maa-nulth First Nations, *Statement of Intent*, online: <[http://www.bctreaty.net/nations\\_3/agreements/MAA-NULTH%20SOI.pdf](http://www.bctreaty.net/nations_3/agreements/MAA-NULTH%20SOI.pdf)> (date accessed 24 July 2005).

economic, political, and technical fronts.<sup>53</sup>

Amongst other things, the Nuu-chah-nulth example testifies to the flux that is a regular feature of human collectivities and the fact that any given person often belongs to a plurality of groups, often imbricated. The matter of which one predominates—*i.e.* which one or ones are relevant for the purposes of s. 35—may be far from immediately obvious.<sup>54</sup> This example also indirectly evokes the complex web of connections that link persons in collectivities: while the cleavage occurred over the preferred collective approach in treaty negotiations, it is far too facile to equate the MFN with the sum total of individuals who supported the original draft AIP. No doubt there were individual members of the MFN who sympathised with the NTC's having rejected that agreement, and individual members of the post-split NTC nations who would have preferred its having been accepted.<sup>55</sup> A more accurate portrayal of the situation is that, in each case, the decision regarding whether or not to support the draft AIP was made collectively by an entity that not only pre-dated the B.C. Treaty Process, but that also could not be torn apart by disagreement over a particular substantive matter, even one as

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<sup>53</sup> "Nuu-chah-nulth Tribal Council Vision and Mission", *supra* note 45.

<sup>54</sup> These phenomena correspond roughly with what Slattery—considering ethnic groupings specifically—calls "social pluralism" (a challenge to the view of well-defined ethnic units) and "personal pluralism" (every individual belongs simultaneously to a number of different groups and the nature and importance of these groups vary with context and over time): "Our Mongrel Selves", *supra* c. II, note 4. See again Alfred's presentation of a "nested" Mohawk identity (*supra* note 42 at 18) as "a challenge to those who see identities as clearly delineated, and whose view of community does not recognize the cross-cutting allegiances which arise over the course of a people's history."

Also of interest to the present discussion are cases in which Aboriginal rights claimants invoke different collective units as rights-holders. See *e.g.* *Bear Island* (H. Ct.), *supra* note 20; *Oregon Jack*, *supra* note 22; *Sask. Indian Nations*, *supra* note 19; *Sask. First Nations*, *supra* note 19; *Treaty 7 Nations*, *supra* note 19; *Treaty Eight First Nations v. Canada (A.G.)*, [2003] 4 F.C. 1043, 2003 FCT 782.

<sup>55</sup> One of the post-split NTC nations did, in fact, originally opt for ratification of the draft AIP. Moreover, the MFN *Statement of Intent*, *supra* note 52, under heading 3, sets out the various processes through which the member nations ratified the modified AIP. Not surprisingly, none of these intimate that the matter was as simple as recording some existing unanimity amongst the MFN membership: the First Nations either held community meetings that authorised ratification through Band Council Resolution, or conducted polls and secret ballots over ratification.

seemingly critical as this. In other words, the First Nations in question are united by things that go far deeper, and are far more lasting, than a commonality of views on a specific topic. These things are all the subtle and idiosyncratic ties of social community that find their roots in lived experience.

Might not assigning categorical effect to declarations of peoplehood hasten the break-up of meaningful collectivities? It is not uncommon that one encounters the presumption, sometimes even held by the very actors involved, that “true” community resides in agreement on substantive precepts and values.<sup>56</sup> Where this sentiment is coupled with the ability to declare autonomy unilaterally, and where the various factions of a community facing division over a given issue lose their appetite to suffer the sometimes difficult processes of compromise and accommodation, the community might simply splinter along lines of agreement.

There are dangers in adopting a definition of community that invests too heavily in agreement. Undoubtedly, most communities do exhibit a core group of values and aspirations that are shared by their members; however, these can typically be rendered in

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<sup>56</sup> It is this sentiment, I think, that drives the frequent efforts in Canada at finding an essential defining characteristic of our citizenship: there seems to be a fear that, unless and until we can locate a list of commonly-held beliefs, there is nothing to sustain our togetherness, no arguments to muster in opposition to those who would seek dissolution of the federation or annexation to our southern neighbours. In fact, the argument is occasionally seized upon by persons embittered that their opinions or preferences are not receiving broader acceptance: a federal election returns the Liberal Party to power on the strength of seats east of the Ontario-Manitoba border and, in the aftermath, a sprinkling of voices (amplified, to be sure, by inordinate press coverage) comes out of Western Canada, demanding not structural change (*e.g.* electoral or parliamentary reforms) the better to accommodate diverse viewpoints, but that secession be mooted as an option to break the “central Canadian” hegemony and enable the implementation of ostensibly more “Western” policies (often, those of the Conservative Party). See Roy McGregor, “Western voices rise in anger” *The Globe and Mail* (30 June 2004) A1; Brent Olthuis, Letter to the Editor, *The Globe and Mail* (1 July 2004) A16. Yet, of course, so-called “Western values” are themselves matters of contestation within the constituency that is supposed to ascribe to them. (On the inevitability of “strains and stresses” in social community, see “Dispossession”, *supra* c. II, note 5 at 461.)

a relatively short list of open-ended principles and general goals.<sup>57</sup> They rarely, if ever, will take the form of a comprehensive and detailed set of uniformly agreed-to means and ends. In this connection, too narrow a focus on substantive agreement works a disservice to the rich diversity that usually characterises human collectivities. In opinion (as in many other respects), no community is perfectly homogeneous.<sup>58</sup> Indeed, it is arguably the case that disagreement over substantive ends may in fact be crucial to the continued viability of most groups, as the engine that powers reflection and renewal: by definition, the stability of a group that is defined by concurrence relies at least in some measure upon a stasis of thought, which suggests diminished individual and collective self-reflection.<sup>59</sup>

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<sup>57</sup> Webber's work on the constitution of political community has particular relevance to the present discussion. In *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994) [hereinafter *Reimagining*] c. 6, Webber argues trenchantly against the presumption that such bodies owe their group-ness to detailed lists of shared values or beliefs. Conceding that a small core of shared values is important, Webber argues (a) that this core is in reality quite compact and (b) that its composition may be identical across a broad variety of similar groups. The vision Webber posits in its stead—in short, that political communities are embodied more in the character of their conversation than in a particular substantive position to a debate—I think conforms as well to the situation of collectivities such as the Aboriginal peoples of Canada. See also Webber, "Challenges of Consent" (Consortium for Democratic Constitutionalism Annual Conference, "Consent as the Foundation for Political Community", 1 October 2004).

<sup>58</sup> Hugessen J. (previously J.A.) made note of this in the context of the *Sawridge Band* litigation. When the *Federal Court Rules, 1998*, S.O.R./98-106 were amended to eliminate the representative action, the Plaintiffs sought to amend the Statement of Claim to reflect that the Bands themselves brought the action. The Crown again argued that this would be inappropriate because the action was by definition only brought by a sub-set of each Band. The Court again rejected the argument (*Sawridge Band v. Canada* (2003), 236 F.T.R. 179, 2003 FCT 665 at para. 15 [emphasis added]):

[I]n my view, the question of whether the band represents all of the band members is irrelevant, since the bands are not suing in a representative capacity, rather they are suing in their own right. It is analogous to a band suing one of its members directly. Since it is already clear that a band is capable of bringing an action, *the fact that all members of the band may not agree is simply irrelevant. Few corporate bodies will at all times be acting in a way which meets the unanimous approval of all their members.*

<sup>59</sup> In the liberal democratic tradition, values such as the freedom of expression are sometimes justified on a similar basis. Alongside arguments that expression is fundamental to individual flourishing (in the sense, for example, that it permits individuals to discover their identity—a notion that Charles Taylor labels "the ideal of 'authenticity'" ("The Politics of Recognition" in A. Gutmann, ed., *Multiculturalism and "The Politics of Recognition": An Essay by Charles Taylor* (Princeton, NJ: Princeton University Press, 1992) 25 [hereinafter "Politics"] at 28)), one finds assertions that, on the social plane, we ought to foster a multiplicity of voices at least in part because it is by subjecting accepted truths to the test of debate that a community avoids atrophy. An example of this is found in Chief Justice Dickson's reasons in *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 968, 58 D.L.R. (4th) 577 [emphasis added]:

Recognising that legal traditions are much richer than whatever positive law they may encapsulate at a given juncture,<sup>60</sup> anything that might retard the progressive or reflective impetus ought to be subject to the strictest scrutiny.

Secondly, there may be concerns about the stability of a group defined by agreement. Consider the matter of geography. Typically, the interactions that form and sustain community owe something to locational proximity. From the family, to the village, to broader national groups, shared space facilitates the exchanges that go into building the thick web of connections that inhere in social units.<sup>61</sup> On the other hand, while a grouping based solely on a state of agreement at a precise moment in time will probably have some geographical correlation, it is unlikely to be an especially strong one—the resulting community, for example, will not replicate the physical togetherness of an actual neighbourhood or village. If, as may be the case, the individual members are not in sufficient proximity to enable regular interaction, it could be difficult for them to sustain cohesion over time. Thirdly, opinions are generally changeable and lack the

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Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, “fundamental” because *in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.*

<sup>60</sup> As Webber puts it, in “Legal Pluralism and Human Agency” [forthcoming, on file with the author] at 2:

[W]hen we set out to respect another legal order (for example, an indigenous legal tradition, or the regulatory autonomy of a particular profession or industry) [...w]e should not aim to protect merely a determinate body of norms, for legal orders are always richer, more complex and more dynamic than a focus on norms alone would suggest. We should respect that order’s practices of normative deliberation and decision-making – the processes by which normative claims are discussed, disagreement adjudicated (in the largest sense of that word), and the resultant norms interpreted and elaborated.

<sup>61</sup> Arguably, in the modern age, the *physical* aspect of this proximity assumes a lesser importance. Groups may more easily maintain their connections remotely, owing to communications technology. To be certain, certain human communities require very little face-to-face contact. But we are not discussing here the many work- or pastime-related groups to which individuals often belong. The topic, rather, concerns fundamental human social units, which, although they may ultimately be sustained over long distance, generally find their genesis in the relationships created in prolonged physical exposure.

relative permanence of deeper cultural connections, such as a commitment to a particular deliberative process. Bare agreement, that is to say, provides a flimsy foundation for any sort of durable community.

As an additional consideration, the prospect of instability poses a challenge in terms of inter-group relations. Transitoriness is hardly a quality that is compatible with the conduct of any sort of ongoing dialogue. It would have a debilitating effect on the already difficult cut and thrust of negotiations between Aboriginal and non-Aboriginal parties if the interlocutors themselves were constantly shifting. All in all, to the extent that a break-away could cause a destructive balkanisation, jeopardising the self-sustaining capacity of both the “splitter” and “splitee,” declarations of peoplehood merit some investigation. For this reason, it is often suggested that it is necessary for claims of peoplehood to be evaluated against some set of criteria. But what sort of criteria? Who will choose them? Who will apply them? How?

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It is commonly asserted—or implied, as by the Supreme Court in *Powley*<sup>62</sup>—that peoplehood is susceptible of determination through the application of an objective test. Such a test would contain a set of criteria or indicia, intended to capture the relevant connections that bind individuals together as a people. By measuring the evidence pertaining to a particular community against these pre-established factors, we would be poised to identify whether it rose to the level of a constitutional rights-bearing people.

The veneer of objectivity does have superficial attractiveness, but it cannot stand up to the weather. Broadly, there are two major flaws endemic in an objective approach: one

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<sup>62</sup> See *supra* c. 1, notes 54, 58-59 and accompanying text.

relates to the initial selection of the criteria, and the other to the difficulties in applying them to a given set of facts. I shall tackle these in order.

Objective criteria do not emerge, as if magically, from the ether; rather, some person or persons must evaluate prospective factors as indicators of peoplehood and come up with a list they believe appropriate to the task. This undertaking is one of tremendous responsibility. In addition, though, it is one that inevitably occurs from a particular cultural vantage point. In the end, criteria-choosers will fix on what appear to be the core indicators of peoplehood *from their perspective*. And peoplehood is largely a matter of perspective: if asked to pinpoint what exactly functions as the key element of its peoplehood, one group might emphasise common ancestral or “racial” bonds. Another might stress tangible elements of culture (language, style of music or dress, religion, or “way of life”<sup>63</sup>) as the collective glue, de-emphasising ancestry to the point where it allows for adult “naturalisation” through marriage or otherwise.<sup>64</sup> Yet there are much more culturally-specific (or *subjective*) ways of understanding “group-ness” that do not necessarily produce these sorts of signposts, and may completely escape the imagination of someone not of that people.<sup>65</sup> For instance, groups might trace aspects of collective

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<sup>63</sup> Each of these was present in the *Powley* trial record. Amongst the various factors supporting Métis peoplehood that the lay and expert witnesses put forward were: ancestry, language (*Michif*), religion (Roman Catholicism), musical tradition (featuring a distinctive style of fiddling), dress (particularly the sash), cuisine, traditional games, and economic way of life.

<sup>64</sup> This is another of the many examples throughout this thesis of the inter-dependence between peoplehood and group membership. In a case where naturalisation is permitted—see *e.g. Deer v. Okpik*, [1980] 4 C.N.L.R. 93 (Que. Sup. Ct.), involving the acceptance of a non-Inuk (Cree) man into Inuit society through marriage to an Inuk woman—this cannot be treated simply as an extension of membership, since it also provides a specific understanding of family and communicates a particular conception about the group’s nature.

<sup>65</sup> This point introduces another inter-dependence: namely, that between (a) the factors that may suffice to indicate that a group is a people, and, once peoplehood is recognised (b) the elements of the particular society that may be described as “central and significant” or “things that truly *made the society what it was*” (in the words of Lamer C.J.C. in *Van der Peet*, *supra* c. 1, note 28 at para. 55 [emphasis in original]). In both cases, the indicators may be “inescapably subjective” to the collective in question, and

consciousness to shared legends or to a particular creation story: these might not only describe the group's putative genesis, but also its relation to the world and to other peoples (*i.e.* defining the people as against what it is *not*).<sup>66</sup>

Whatever indicia are chosen in the result, one can say with near certainty that they will not be capable of accurately reflecting the self-conceptions of *all* Aboriginal peoples. This failing is crucial in two ways: first, where the selected criteria clash with a people's self-conception, there is a possibility that application of the test could produce skewed results, as I shall discuss below; but even prior to that, groups seeking recognition under s. 35 will, in light of the stakes involved, be pressured to show conformity to the "test." Along the way, the collective might be irreversibly contorted into quite a different form. The commitment made by s. 35 must be oriented towards an exit from that state of affairs, not towards its entrenchment.<sup>67</sup>

We may draw an analogy from Canadian legislative history.<sup>68</sup> One poignant, if at first seemingly oblique, example involves the government's response to expressions of concern by First Nations leaders in Canada East in the mid-1800s, over the presence of

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"that which is most dear to a society may be overlooked or regarded as 'incidental' to others": Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993 at 1000.

<sup>66</sup> Author Thomas King, in his outstanding collection of essays drawn from the 2003 C.B.C. Massey Lectures (published as *The Truth About Stories: A Native Narrative* (Toronto: Anansi Press, 2003)), discusses how, if he ever got the chance to meet the inhabitants of Pluto, he would "want to hear a creation story, a story that recounts how the world was formed, how things came to be, for contained within creation stories are relationships that help to define the nature of the universe and how cultures understand the world in which they exist." A creation story might provide positive substance to a people's collective world view, sense of morality, or understanding of its purpose (not to mention important context in its appreciation of the wrongs it may have suffered at the hands of others).

<sup>67</sup> As I discussed above at 55-59, the instances of legislatures' having overridden or ignored Aboriginal concerns, which are legion, are a matter of historical fact that cannot be changed. Canadian society must do its best to ameliorate the situation, and to ensure that it will not repeat.

<sup>68</sup> Although not a constitutional document, the *Indian Act*, *supra* note 5—because of its significant organisational and material implications, and the important effects it has on collective and individual identity—provides a reasonable analogy for present purposes.

non-Aboriginal men on reserved lands. As RCAP states: “Although married to Indian women and hence part of the reserve community, these men brought with them ideas and perspectives that appeared to threaten traditional Indian culture, particularly as it affected land use.”<sup>69</sup> Having already moved to limit the classes of persons holding rights over Aboriginal lands by introducing the concept of “Indian blood,”<sup>70</sup> the legislature chose to enact an amendment excluding all non-Indian men (*i.e.* men not being “of Indian blood”) who married Indian women; non-Indian women who married Indian men, however, were at first still deemed to be Indians.<sup>71</sup> In these events, RCAP notes, the legislature carried its “remedial measures much further than desired by Indians themselves.”<sup>72</sup> Put another way, in response to a particular First Nations concern, the law-makers relied upon their own presumptions about group-ness, which did not jibe with the perspective of the peoples in question.

Because “status” here is so directly linked to the exercise of important collective

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<sup>69</sup> RCAP *Looking Forward Looking Back*, *supra* note 4 at 269. See also the summary of the various legislation by John Giokas & Robert K. Groves in “Collective and Individual Recognition in Canada” in Chartrand, *supra* note 4, 41 at 51-69.

<sup>70</sup> In *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, S. Prov. C. 1850, c. 42, s. 5, the legislature specified certain classes of persons that would be considered Indians “for the purpose of determining any right of property, possession or occupation in or to any lands belonging or appropriated to any Tribe or Body of Indians.” These were: (1) persons of Indian blood, “reputed to belong” to the people in question, and their descendants; (2) persons intermarried with such Indians and residing amongst them, and their descendants; (3) persons residing among the Indians, whose parents on either side were members of the tribe or were entitled to be treated as such; and (4) persons adopted in infancy and residing in the community, and their descendants. *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S. Prov. C. 1850, c. 74, s. 10 also provided that only Indians and those married to them were permitted to settle, reside upon or occupy Indian lands, but this Act did not provide a detailed enumeration of who could be considered an Indian (until amended by *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, c. 26, s. 1).

<sup>71</sup> *An Act to repeal in part and to amend an Act, intituled An Act for the better protection of the Lands and property of the Indians in Lower Canada*, S. Prov. C. 1851, c. 59, s. 2. The amendment effectively dropped class (2) from the earlier legislation (see note above), replacing it with a provision deeming women “now or hereafter to be lawfully married” to Indians, the children issuing from the marriage, and their descendants, to be Indians. The amendment also eliminated class (4) from the earlier Act (see note above), and expressly provided that its definition was exhaustive.

<sup>72</sup> RCAP *Looking Forward Looking Back*, *supra* note 4 at 269.

rights (I have already discussed, above, the tendency for the *Indian Act* band structure to eclipse more traditional modes of community), this example again highlights the interdependence between peoplehood and group membership. The legislation appears, at first glance, to have been solely concerned with the latter; however, by deeming individual Indian status to be a matter of “blood”, measured at an arbitrary date,<sup>73</sup> which thereafter descends along the patrilineal line, the legislature was simultaneously defining the peoples themselves.<sup>74</sup>

Infamously, Parliament continued on the same path following Confederation,<sup>75</sup> soon

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<sup>73</sup> It is unclear how the legislators ever intended the concept of “Indian blood” to be interpreted or adjudicated. In many instances, the reported cases suggest that it was dealt with as a matter of physical appearance and that no independent evidence of a link to a First Nation community was required: see e.g.: *R. v. Mellon* (1900), 7 C.C.C. 179 (N.W.T. S.C.); *R. v. Pickard* (1908), 14 C.C.C. 33 (Alta. Dist. Ct.); *R. v. Verdi* (1914), 23 C.C.C. 47 (N.S. Co. Ct.); *R. v. Martin* (1917), 29 C.C.C. 189 (Ont. S.C. (A.D.)); *R. v. Bennett* (1930), 55 C.C.C. 27 (Ont. Co. Ct.). Even in *R. v. Drybones* (1969), [1970] S.C.R. 282, 9 D.L.R. (3d) 473—which famously declared that the *Indian Act* prohibition on off-reserve intoxication was inoperative, owing to conflict with the *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(b)—the Court presumed that the distinction drawn in the legislation was a “racial” one.

For instance, in *R. v. Howson* (1894), 1 Terr. L.R. 492, 3 C.N.L.C. 553 (N.W.T. S.C.) [cited to Terr. L.R.], Wetmore J. upheld the appellant’s conviction for selling liquor to an Indian, contrary to *The Indian Act*, R.S.C. 1886, c. 43, s. 94. Wetmore J. held (at 494) that Parliament intended the *Act*, “to apply to a body of men who are the descendants of the aboriginal inhabitants of the country, who are banded together in tribes or bands, some of whom live on reserves and receive monies from the Government, some of whom do not.” The court noted that the buyer in question, Bear, was a “half-breed”, but rejected the appellant’s contention that this provided an answer to the charge. In the court’s view (*ibid.*), Bear fell under the definition of “Indian” in s. 2(h) of the *Act* because: “[T]he popular and ordinary meaning of the words ‘any male person of Indian blood’ [...] mean any person with Indian blood in his veins, and whether such blood is obtained from the father or mother.” Furthermore (at 495):

...if the defendant’s contention is adopted it would be necessary in every case to prove that such Indian was a full blooded Indian, because the burthen of proof is on the prosecutor, and he is bound to show that the person with respect to whom the offence was committed is an Indian as defined by the Act, and that is, according to his contention, a full blooded Indian—how in the world could that be done?

Interestingly, Wetmore J. also held (at 496) that, even if Bear’s mother had ceased to be an Indian person upon her marriage to a non-Indian, this “did not affect her blood which she transmitted to her son.” On this view, children of women who lost status would still themselves be able to claim status.

<sup>74</sup> This remains true, I think, even though the goal of the legislation was ultimately to “enfranchise” First Nations persons in order to bring to an end their separate status. To be sure, Parliament was not recognising Aboriginal collectivities for the purpose of respecting their ongoing distinctness. Nonetheless, in making provisional rules with respect to the nature of the groups that could share in First Nations resources, *etc.*, it necessarily spoke to a conception of Aboriginal group-ness.

<sup>75</sup> See *An Act respecting Indians and Indian Lands*, C.S.L.C. 1861, c. 14, s. 11; *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian*  
(cont’d)

going even further and revoking the status of First Nations women who married non-status men.<sup>76</sup> The situation continued throughout successive versions of the *Indian Act*, until, just before the effective date of the *Charter*'s equality provision, the government introduced Bill C-31.<sup>77</sup> The amendments that were introduced, however, have neither rectified the damage caused by the past mistakes nor ended the controversy "going forward"; apart from the legal challenges to the Bill itself, the concept of registration under the current *Indian Act* remains linked to provisions in legislative antecedents. The former Acts no longer exist in corporeal form on the books, rather, they haunt from beyond.<sup>78</sup>

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*and Ordinance Lands*, S.C. 1868, c. 42, s. 15. (The pre-Confederation Province of Canada never introduced this measure in respect of Canada West, where all persons intermarried with "persons of Indian blood" were considered Indians: *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, *supra* note 70; *An Act respecting Civilization and Enfranchisement of certain Indians*, C.S.C. 1859, c. 9, s. 1; *An Act to prevent trespasses to Public and Indian Lands*, C.S.U.C. 1859, c. 81, ss. 20, 25.)

<sup>76</sup> *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c. 6, s. 6; *An Act to amend certain laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia*, S.C. 1874, c. 21, s. 8; *The Indian Act, 1876*, S.C. 1876, c. 18, s. 3(3).

<sup>77</sup> See *supra* c. 1, note 4. (By s. 32(2) of the *Charter*, the guarantee of equality in s. 15 did not come into force until 17 April 1985.) A prior challenge to these rules under s. 1(b) of the *Canadian Bill of Rights*, *supra* note 73, was rejected in *Lavell*, *supra* note 14, but in *Lovelace v. Canada* (1981), U.N. Doc. Supp. No. 40 (A/36/40) 166, [1983] Can. H.R.Y.B. 305 the United Nations Human Rights Committee declared that denying a Maliseet woman, who had married and subsequently divorced a non-Indian man, the legal right to return to her former reserve breached her right under art. 27 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) to enjoy her own culture in community with the other members of her group.

<sup>78</sup> For example, the female plaintiff in *Perron*, *supra* note 17 lost her status under the *Indian Act*, S.C. 1951, c. 29 after marrying a non-Aboriginal man. She regained status under Bill C-31, *ibid.*, which automatically entitled her son as well. But her son's having also married a non-Aboriginal person, the grandchildren were not entitled. The plaintiff claimed the post-Bill C-31 *Indian Act* remained discriminatory because the grandchildren of her brother (who had married a non-Aboriginal woman) were entitled to registration. The practical effects of *Indian Act* status are strong motivators in persons' deciding to seek status under Bill C-31, as illustrated by the evidence of Olaf Bjornaa in the *Powley* case. See also *Lavigne*, *supra* note 36 and, generally, Gilbert, *supra* note 5. Moreover, the effect of Bill C-31 on First Nation communities has led to legal challenges: see *supra* note 26. Finally, for criticism of Bill C-31 from the very constituency it was designed to help, see Native Women's Association of Canada, News Release

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The colonial legislation marked the first time that the male line was privileged in matters of Indian status and residency rights, but it was a societal mould that would be quickly imposed on the First Nations, setting in train a process of distortion. Those persons excluded from the legislative definition were expelled from reserve lands, physically and symbolically separated from the collective. Over time, these persons no longer formed part of how the collective saw itself. The legislation did nothing less than transform these societies, remodelling them along strong patrilineal and patriarchal lines.<sup>79</sup> In the process, First Nations women, not surprisingly, bore many of the effects.<sup>80</sup> While this situation involved a direct imposition of foreign conceptions of peoplehood, and while the conception involved was an extremely blunt one, the example's basic lesson is germane to the present discussion. In general, on both the intimate and social planes, in Charles Taylor's words:

our identity is partly shaped by recognition or its absence, often by the *misrecognition* of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.<sup>81</sup>

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"Bill C-31: The Discrimination Continues 20 Years Later" (17 April 2005), online < <http://www.nwac-hq.org/BillC31PressRelease.pdf> > (date accessed: 23 October 2005).

<sup>79</sup> *RCAP Perspectives and Realities*, *supra* c. 1, note 26 at 24ff. See also George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills, ON: Collier-Macmillan, 1974) at 21: the "strict tracing of male blood line" enshrined in legislation since the 1850s was "an English way of tracing heritage not accepted by very many Indian societies."

<sup>80</sup> *RCAP Perspectives and Realities*, *ibid.* at 28.

<sup>81</sup> "Politics", *supra* note 60 at 25 [emphasis in original]. Taylor identifies Frantz Fanon's influence here, particularly in his "notion that [in the post-colonial context] there is a struggle for a changed self-image, which takes place both within the subjugated and against the dominator" (*ibid.* at 65). For works devoted more generally to the newcomers' super-imposition of their own versions of "Indianness", see Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Alfred A. Knopf, 1978); Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1989); *Linking Arms*, *supra* c. II, note 29 at 14-39; Daniel Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992). In addition, a number of modern authors have provided historical analyses of non-indigenous writers' treatment of indigenous peoples. For discussion pertaining specifically to Canada, see *e.g.* Donald B. Smith, *Le Sauvage: The Native People in Quebec Historical writing on the*

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To this I would add that the pernicious effects of misrecognition—the distortions—reach their maximum when, by virtue of the prevailing power structure, the once inaccurate reflection comes to dominate, and the group loses something irreplaceable.

Let us turn, then, to the matter of application. The first thing to note is that the objective test can never be just that: even if it were possible to compile an exhaustive list of relevant criteria, the objective test would never achieve in practice what it claimed in theory. In certain cases, any one or all of the factors might well be indicators. But they would not, globally or individually, assume uniform importance across all peoples. An element of subjective judgment will enter the equation whenever the party charged with deciding the matter has to weigh the evidence and determine, for instance, whether the absence of a given criterion is fatal, or whether a particular mix achieves the “critical mass” necessary to prove peoplehood. I am not suggesting that such judgments cannot be made: they are made all the time. But the party making them cannot claim to be truly *objective*.

Like the party who selects the criteria, the person who is charged with assessing the evidence and adjudicating the matter under an ostensibly objective approach wields a lot of power.<sup>82</sup> We presume that he or she will make every effort to act fairly and free from impartiality, as this is understood at law. But bias and closed-mindedness are only the most obvious threats to an even-handed judgment: the more insidious one resides in the

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*Heroic Period (1534-1663) of New France*, National Museum of Man Mercury Series, History Division Paper No. 6 (Ottawa: National Museums of Canada, 1974); Bruce G. Trigger, *Natives and Newcomers: Canada's "Heroic Age" Reconsidered* (Kingston and Montreal: McGill-Queen's University Press, 1985) c. 1.

<sup>82</sup> My usage of the word “person” is deliberate here. While it may be true that the recognition decision is officially made by an arm of the state, there is typically one Minister, Deputy Minister, or other high-ranking bureaucrat who has responsibility for it. Likewise, if the decision is made by the judicial arm, it is typically one judge who is charged with making it.

descriptive elusiveness of peoplehood. Despite constant exhortations from the Supreme Court that it is necessary to consider the Aboriginal perspective in connection with s. 35, it is difficult to do so with a matter like peoplehood, which is not susceptible to easy articulation.<sup>83</sup> Adjudicators may be left to rely upon their own impressions, which are again going to be rooted in their particular cultural *milieux*. As impartial as the adjudicator may strive to be, there can be no compensating for things that lie beyond his or her comprehension.

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The difficulty with each of the above approaches is that peoplehood is simply too elusive a concept, too grounded in the particular and richly subjective connections that bind individual members to their collective, to be susceptible to these simple reductions. None can replicate what it is that Aboriginal groups *do*—in terms of the role they play in their members' lives and the type of importance that they bring to them—let alone get around the blind spots caused by cultural difference. I do not at all suggest that the question admits of an easy answer or, what is not necessarily the same, an easily articulable one.

Certain themes, however, do emerge from the foregoing critiques. Bringing these to bear on an understanding of what is truly at issue in the Aboriginal rights context, it is possible to present, in general terms, a positive conception of the type of community that s. 35 envisions. My goal in this concluding section of the chapter is to identify and discuss what I believe to be the more salient aspects of such a conception.

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<sup>83</sup> For example, while their narratives provided more compelling evidence of modern community than the clinical and document-based evidence of the experts, the Métis lay witnesses in *Powley* had an exceedingly—but understandably—difficult time describing the “X factor” that enabled them to say with certainty that a Métis people existed in the Sault Ste. Marie area.

- *The investigation must be aimed at the intensity and quality of the group's cultural character*

Given the vision of Aboriginal rights and definition of “Aboriginal” elaborated above, it is clear that the nub of modern rights-holding status is the capacity to generate norms or customs in opposition to those imposed or followed by the non-Aboriginal order. In respect of all of the examples I have cited in this thesis—the Sault Ste. Marie Métis community, the Labrador Métis, the Oregon Jack Creek and Sawridge Bands, the Rising Sun Community Restigouche West/*Communauté Soleil Levant*, the NTC/MFN, *etc.*—the relevant questions are (a) whether these groups are the modern incarnations of Aboriginal groups that represented, and (b) whether they themselves continue to represent, sufficiently dense sites of interaction as to possess their own means of determining social norms.

Importantly, this is not merely an investigation into the existence of a particular set of shared customs or traditions; instead, our attention should be directed at the group's capacity or aspiration to engage in a process of “normative determination”. *Dicta* found in certain cases, suggesting that it is the continuance of particular customs that is central, should not be followed.<sup>84</sup> Rather, we are interested in finding in the group some sort of demonstrable concern with maintaining control over the method(s) through which it decides on, agrees to, or consents in the actual substance of its normative order.<sup>85</sup> We are also interested in finding in the group the *ability* to act on that concern.

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<sup>84</sup> For instance, in *Mabo (No. 2)*, *supra* c. II, note 15 at 60, Brennan J. stated: “[W]hen the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.”

<sup>85</sup> See “Legal Pluralism and Human Agency”, *supra* note 60 at 7, where Webber emphasises: “Law is not based on the natural existence of a normative order, which all members of society implicitly accept. It is based on the desire to *make* a normative order, to have some order established, even in the face of continued normative diversity at large.” [Emphasis in original.]

This is not entirely dissimilar from the approach suggested in *RCAP Restructuring the Relationship*.<sup>86</sup> In discussing the matter of self-determination, the Commissioners presented a vision of Aboriginal nationhood that included what they termed “a collective sense of identity”. In the Commissioners’ view, this is usually grounded in a common heritage, but could also be a product of “shared contemporary situation and outlook”.<sup>87</sup> In distinction to the approach taken in the RCAP Report, however, my conception is less concerned with the various factors that might motivate individuals to come together to begin with, and is more focussed on what the community seeks to achieve once it is together.

- *The party charged with making the recognition decision must carefully and sensitively evaluate the record for any indication of a distinct normative process*

In many cases, the inquiry is bound to be one led by impressions rather than “hard facts”. There may be “objective” facts capable of revealing the contours of an Aboriginal legal order, patterns of behaviour that provide strong hints. Or, the relevant indicia could be entirely subjective, discernable only in the first-hand accounts of the members of the would-be group. Regardless, one might best structure the inquiry by adopting a simple and pragmatic approach: decision-makers ought to review the evidence in an attempt to discern whether it reveals the particular type of norm-generating community with which s. 35 is concerned. In so doing, they must do their best to immerse themselves in the thickly subjective links of the alleged community, taking into account the claimants’ perspective on the matter.

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<sup>86</sup> *Supra* c. II, note 34 at 178ff.

<sup>87</sup> *Ibid.*

In both *Van der Peet*<sup>88</sup> and *Delgamuukw*,<sup>89</sup> Chief Justice Lamer exhorted trial courts to approach the rules of evidence in Aboriginal law cases with a modicum of flexibility. *Powley* provides a good example of the challenges courts may face, and of the necessity for a more open approach to both admissibility and evaluation of evidence. The lay witnesses in *Powley* struggled to express what it was that made the Métis persons in Sault Ste. Marie a *community*. This sort of evidence is unlikely to take the form of an expert treatise. It may be presented in vignette or anecdotal form. A decision-maker faced with such evidence must do his or her best to evaluate whether it provides support for the existence of a community with its own norm-generating process.

It may be that, practically speaking, it is difficult to find evidence that speaks to anything other than conflict between the *actual normative content* of Aboriginal and non-Aboriginal societies. However, as the existence of temporary harmony between the specific norms prevailing in two different societies does not bring to an end those societies' respective capacity for normative determination,<sup>90</sup> the decision-maker should evaluate diligently *all* testimony provided by the members of the would-be community, even if descriptions of particular norms appear at first glance to differ little in substance from those in the dominant legal order.

It goes without saying, this will not be a judgment of the worth or value of the normative community, merely an inquiry into its existence. Moreover, since the decision-makers are by definition seeking something that is foreign to dominant conceptions, they

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<sup>88</sup> *Supra* note 65 at para. 68.

<sup>89</sup> *Supra* c. II, note 15 at paras. 80-88.

<sup>90</sup> For instance, in the federal context, the existence of identical laws in neighbouring provinces—say, hypothetically, B.C.'s and Alberta's *Negligence Acts*—does not impair either province's ability to amend or repeal that law in the future.

must not view themselves as bound to follow slavishly the line of jurisprudence that would require Aboriginal claims to find analogues in the common law tradition.<sup>91</sup> On the contrary, the goal is first to find whether there is an Aboriginal collectivity with a normative tradition that *conflicts* with the relevant common law or statutory rules, and then to fashion a suitable result.

- *Individuals may be members of multiple rights-holding groups in a federal relationship*

In some cases, a relatively small group will be a constituent (or “federal”) part of a larger one. It may be that the constituents are the ultimate authorities for determining particular aspects of the normative order.<sup>92</sup> For the individual person who is a member of both groups, it may be that he or she can claim Aboriginal rights of each. What will be key in a situation like this is that the evidence show distinct spheres of normative engagement: *viz.* support for the conclusion that the smaller group represents the appropriate determining authority for some normative aspects, and *vice versa*. For instance, where a community traditionally breaks into smaller units for certain seasons of the year, it may be that the wintering community is the one to which members look for certain customs (*e.g.* those related to hunting), but the larger summering community is the

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<sup>91</sup> Lamer C.J.C. held in *Van der Peet*, *supra* note 65 at para. 50 that: “[T]he only fair and just reconciliation is [...] one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.” See also *Delgamuukw*, *supra* c. II, note 15 at para. 112 (*per* Lamer C.J.C.). Very recently, in what appears to be an astonishing revision to the doctrine of Aboriginal rights, McLachlin C.J.C. held in *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, 235 N.S.R. (2d) 151 at paras. 45-51 that this reconciliatory process requires Aboriginal claimants to “seek a corresponding common law right” and to prove that their “practice corresponds to the core concepts of the legal right claimed”.

<sup>92</sup> This, again, is similar to what is described in *RCAP Restructuring the Relationship*, *supra* note 86 at 179, where the Commissioners state that local communities in an Aboriginal nation will have to come together for the purposes of exercising the right of self-determination, but that “it would be natural for a reconstituted Aboriginal nation to adopt a federal style of constitution that ensures that a considerable measure of authority rests with local communities.”

one to which they look for certain others (*e.g.* those related to fishing).

- *A group might be a rights-holding entity for one purpose, but not for others*

It follows that one individual might belong to a number of different Aboriginal collectivities, exercising a species of site-specific rights in the name of one group and participating in another's more traditionally "national" rights (*e.g.* self-government,<sup>93</sup> Aboriginal title or the right to enter into a comprehensive treaty with the Crown<sup>94</sup>). For this reason, I have throughout this thesis deliberately used a variety of terms to describe the rights-holding entities under s. 35: the term *people* in the actual constitutional text should not be interpreted as "setting the bar" in accordance with that word's meaning in other legal contexts.

What is important is not a particular legal lexicon, but rather whether the collectivity in question fits the norm-generating criterion. To be sure, certain prosecutorial submissions to the contrary,<sup>95</sup> the recognition that smaller Aboriginal communities may hold their own site-specific rights is in no way a negation of broader rights held by the larger communities.

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<sup>93</sup> In *RCAP Restructuring the Relationship*, *supra* note 86 at 179, the Commissioners defined the "nation" (in part) as the level of social organisation that could exercise a right of self-government. They then recommended that Parliament adopt legislation to enable Aboriginal communities to come together as nations and seek governmental recognition.

<sup>94</sup> In "What Are Aboriginal Rights?", *supra* c. II, note 41 at 4-6, Slattery identifies Aboriginal title and the right to conclude treaties as "generic Aboriginal rights", *viz.* rights of a standardised character, basically identical in all Aboriginal groups that hold them.

<sup>95</sup> In *R. v. Laviolette*, 2005 SKPC 70, [2005] 3 C.N.L.R. 202, for example, the Crown argued (unsuccessfully) that *Powley* was authority for the proposition that no unit larger than a village, town or city could hold Aboriginal rights.

- *The investigation should be aimed at the particular kind of normative order implicated in the instance*

The inquiry is, by necessity, entirely fact-specific: in a prosecution under fish or game legislation, the rights-claimant ought not to be called upon to prove the existence of (and his or her membership in) anything more than an Aboriginal collectivity with a normative system governing the conduct of individual members engaged in the particular pursuit; likewise, in respect of Aboriginal title negotiations, the claimant group ought to establish that it is an Aboriginal community of sufficient density to engender relations to the land and environment of the sort that would conflict with competing assertions of the Crown.

Hypothetically, for example, if the evidence before Judge Vaillancourt showed (a) that there was historically a number of “mixed-blood” persons (b) who hunted with a certain intensity, (c) in a time or manner that did not fully resemble that of the non-Aboriginal populace of the region and (d) that indicated that they might have been operating somewhat in concert or obeying a common set of customs, then it could be open to the judge to conclude that the individuals formed, at least for the limited purposes of hunting, an Aboriginal rights-bearing collectivity. The question would then turn to whether the modern group had a relationship of continuity with this historical group.

This should not, however, be taken to preclude a modern claim of a right to fish where it can only be shown that the historical group engaged in hunting. In keeping with the rejection of “frozen rights” and the rather expansive approach taken in *Powley* (the Court preferred Dr. Ray’s characterisation, namely, that the members of the Métis community “earned a substantial part of their livelihood off of the land”, over the Crown’s much more narrow assertion that the right was limited to hunting and, further, to

individual species<sup>96</sup>), it ought reasonably to be enough for the claimant to show that the forms of conduct governed by the historical community's normative order correspond in a rough and general way to that currently in question. If changes in location or environment resulted in an evolution of the group's food-gathering pursuits, there is every reason to allow the modern claimant to exercise the right as it is relevant to today's conditions.

- *The historical inquiry should focus on the time when European legal systems truly began to obtain in the region*

It was the introduction of effective European legal orders—not the mere arrival of explorers or missionaries, or the establishment of a few scattered and isolated settlements—that provided occasion for the emergence of the doctrine of Aboriginal rights. It follows that the communities of interest in this inquiry are those whose normative orders came, or could have come, into conflict with those of the newcomers. The modern rights-claiming community should be placed under no greater burden of proof than to show that it is the successor (or one of the successors) to an historic community at the time when the competing European legal order was established in the region.

- *There must be evidence that the contemporary claimant is an actual community*

At points in its judgment in *Powley*, the Supreme Court seemed to emphasise continued *individual* practice of customs linked to the historic Sault Ste. Marie Métis

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<sup>96</sup> See *Powley* (S.C.C.), *supra* note 27 at para. 43, citing Dr. Ray's Report, *supra* c. 1, note 64 at 56.

community.<sup>97</sup> This may be chalked up to the fact that the trial record contained scant evidence concerning the contemporary community, other than the testimony concerning role played by the MNO. But in the absence of such evidence, I suggest that it was incumbent upon the Court to investigate more closely whether or not the MNO or OMAA actually functioned as, or otherwise represented, the rights-bearing community. Otherwise, one risks losing sight of the fundamental collective nature of Aboriginal rights and, potentially, vesting these rights in a scattering of individuals who can claim biological descent from a former norm-generating community, but who have no real connection to a contemporary successor of that community. In this connection, once the decision-maker recognises an historic community, the inquiry should turn to the matter of continuity.

- *Continuity between the historical and modern groups need not be absolute*

As already stated, there is no reason to require that the rights-holding group remain today in its exact historical form. An *Indian Act* band may be the proper successor to a First Nation. Indeed, in some circumstances, even a recently-incorporated body might be the (or *a*) legitimate successor to an Aboriginal group that pre-existed and survived the dominance of the European legal order. Alternatively, it might represent another phase of community, a conglomeration of smaller bodies into a rights-bearing “national” whole: the NTC provides an example of this.

The central issue, again, is with the continuity of the norm-generating capacity; institutional continuity is a concept distinct from this. Although the latter can undeniably play a role in the continuity of this normative role, it cannot be said to lie at the core of

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<sup>97</sup> See the discussion *supra* c. 1, note 76 and accompanying text.

the matter. As s. 35 does not involve the “freezing” of any particular manifestation of rules, it likewise does not restrict the community to one particular institutional form.

- *There is nothing automatically barring a “dormant” group from reviving*

Case law refers to the possibility that an Aboriginal collectivity’s “national fire” might be extinguished, or that the “tides of history” might wash away its rights-holding status.<sup>98</sup> There is no question that there is a “point of no return” whereafter a long-dormant group cannot be revived: no one can reasonably assert that the Beothuk people who disappeared from Newfoundland in the early nineteenth century can re-emerge as a rights-holding people.<sup>99</sup> Nonetheless, there does not appear to be any compelling reason in principle why the continuity requirement would necessarily bar a “dormant” Aboriginal community from reviving and once again claiming Aboriginal rights. A group may have temporarily lost its normative hold on its members, yet may attempt to resume its former status later, upon its re-establishment as a fundamental social and cultural medium in a subsequent generation.

Presume, for instance, that members of the dormant community are absorbed into other Aboriginal collectivities or non-Aboriginal society. Years later, individuals who were youths at the time the group dissipated decide to introduce their children or grandchildren to the old community traditions. There is no reason to deny a community like this the ability to hold s. 35 rights, peremptorily, on these grounds alone. There should be no obligation for the group to show an “unbroken line” of continuity, provided that it

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<sup>98</sup> *Fletcher v. Peck*, *supra* c. II, note 15 at 146 (*per* Johnson J., dissenting); *Mabo (No. 2)*, *supra* note 84 at 60; *Members of the Yorta Yorta Aboriginal Community v. Victoria*, [2002] H.C.A. 58.

<sup>99</sup> The Beothuk are commonly referred to as “extinct”, but there are some theories that a number of Beothuk persons left for Labrador, where they were incorporated into the Innu and Naskapi peoples.

passes the test of “Aboriginality”: that is, that the community is the successor to a social order that took hold prior to the effective imposition of that of the newcomers, and that it exists today as a fundamental source of individual and collective identity for its members.

Again, it has been in large part owing to wrong-headed assimilatory policies of the Canadian government that some Aboriginal societies were weakened,<sup>100</sup> and it does not accord with the constitutionalisation of Aboriginal rights to deny s. 35 to communities that are only now able to begin re-building their dignity. Where the record indicates that the modern group has a close connection to the “dormant” group and that the modern group represents to its members roughly what the “dormant” group represented to its, we ought to recognise this as a sufficient continuity for the purposes of s. 35.

I note that I have throughout this discussion used the generic term “decision-maker”. It deserves mention that, if the perpetually large volume of Aboriginal rights court cases is any guide, in the instances where recognition is likely to be an issue—where the situation is in any way exceptional—the parties are in all probability going to find themselves petitioning the judicial forum for resolution. Indeed, as the *Powley* case itself again illustrates, the judicial review process facilitated by the *Constitution Act, 1982*<sup>101</sup> has been an attractive avenue to previously marginalised individuals and

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<sup>100</sup> A good example is *Kingfisher v. Canada* (2001), 209 F.T.R. 211, 2001 FCT 858, aff'd (2002), 291 N.R. 314, 2002 FCA 221, leave to appeal to S.C.C. refused (*sub nom. Kingfisher v. The Queen*) [2003] 1 S.C.R. xii, wherein descendants of the Chief Chipeewayan Band brought an action for breach of fiduciary duty, flowing from the Crown's failure to retain lands that had been promised under Treaty 6. Shortly thereafter, the Band dispersed, but the individuals concerned did not lose their “Indianness”: some members, for example, appeared on other bands' treaty paylists. When the case was finally brought, early in the 21st century, the Crown argued—successfully—that the plaintiffs could not succeed unless they showed descent “in an unbroken line” from members of the Band at the time of treaty. Not only does this put a substantial evidentiary burden upon claimants (contrary to Chief Justice Dickson's warning in *Simon*, *supra* note 27 at 407-08), but it also fails to comprehend that Aboriginal community is based on far richer things than mere ancestry.

<sup>101</sup> *Supra* note 2, s. 52(1).

collectivities in their attempts to contest the dominant order.<sup>102</sup> And, interestingly, in spite of the courts' frequent admonitions to the parties that the preferable solution to Aboriginal rights claims lies in negotiation, not litigation,<sup>103</sup> the decision in *Powley* appears to have ushered in a veritable explosion in Métis rights court cases rather than the desired move to the bargaining table.<sup>104</sup> Indeed, the Court might now be accepting this reality, as on two recent occasions it appears resigned to the fact that litigation is bound to play a significant role in the future delineation of Aboriginal rights.<sup>105</sup>

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<sup>102</sup> See *supra* c. I, note 13. The Powleys were offered the opportunity to end the legal battle through a judicial stay of charges, but declined in order to present a "test case" for the vindication of Métis rights.

<sup>103</sup> In the Supreme Court alone, see *e.g.* *Sparrow*, *supra* note 18 at 1105; *Van der Peet*, *supra* note 64 at paras. 311, 313 (*per* McLachlin J. (now C.J.C.), dissenting, but not on this point); *Delgamuukw*, *supra* note 89 at para. 186 (*per* Lamer C.J.C.); *Marshall (No. 2)*, *supra* note 31 at para. 22; *Mitchell v. M.N.R.*, *supra* c. II, note 15 at para. 20 (*per* McLachlin C.J.C.); *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 at para. 47 (*per* LeBel J.); *Haida*, *supra* note 13 at para. 14; *Taku River*, *supra* note 13 at para. 24.

<sup>104</sup> See *e.g.*: *R. v. Willison*, *supra* c. I, note 48; *R. v. Norton*, *supra* note 29; *R. v. Laviolette*, *supra* note 95; *R. v. Manners*, *supra* c. II, note 44; *R. v. Burns*, *supra* c. II, note 44; and all of the New Brunswick cases cited *supra* note 33.

<sup>105</sup> See *Powley* (S.C.C.), *supra* note 27 at para. 50 ("a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt") and *R. v. Marshall*; *R. v. Bernard*, *supra* note 91 at para. 144 (*per* LeBel J., concurring):

The question of aboriginal title and access to resources in New Brunswick and Nova Scotia is a complex issue that is of great importance to all the residents and communities of the provinces. The determination of these issues deserves careful consideration, and all interested parties should have the opportunity to participate in any litigation or negotiations. Accordingly, when issues of aboriginal title or other aboriginal rights claims arise in the context of summary conviction proceedings, it may be most beneficial to all concerned to seek a temporary stay of the charges so that the aboriginal claim can be properly litigated in the civil courts. Once the aboriginal rights claim to the area in question is settled, the Crown could decide whether or not to proceed with the criminal charges.

#### IV. Membership and Beyond

Once a clear picture emerges as to which collectivities s. 35 applies, there can be little justification for demanding an individual to prove a strongly ancestral link in order to benefit from Aboriginal rights. As discussed in chapter one above, imposing the ancestral requirement would be a clear fetter on the community's ability to self-define and to retain the flexibility needed to adjust to a changing world; for the reasons already discussed, it ought to be left up to the community in question to determine: (a) whether or not to require an ancestral connection; and (b) if it chooses to do so, how strong a connection is required and how it is to be proven.

What is more, a court-imposed ancestral or genealogical requirement represents a misunderstanding about the nature of Aboriginal rights and the groups that benefit therefrom. It suggests, erroneously, that Aboriginal rights descend by way of the individual members, rather than by way of the communities themselves. It also suggests, erroneously, that Aboriginal group-ness has an inherent genetic component.<sup>1</sup> These misunderstandings have the potential to eclipse more sensitive understandings of

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<sup>1</sup> In addition to all of the above discussion on this point, see Paul L.A.H. Chartrand, "The Aboriginal Peoples in Canada and Renewal of the Federation" in K. Knop *et al.*, eds., *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* (Vancouver: UBC Press, 1995) 119 at 122-23 [footnotes omitted]:

Aboriginal rights are by their nature group rights, in the sense that they inhere in the individual not as a result of his or her personal existence, but as a result of his or her membership in the group. The widespread failure to appreciate this point is evidenced by the common reference in Canada to 'persons of Aboriginal ancestry.' This terminology fails to acknowledge that it is not personal antecedents per se which determine the present identity of any particular individual. [...]

One of the most pervasive notions in Canada is that Aboriginal peoples comprise a racial minority, and that they are not distinct peoples entitled to political liberty and equality with other peoples. [...But] Aboriginal peoples are not arguing in favour of maintaining biological purity, but in favour of maintaining cultures.

Aboriginal peoples; they can lead to scenarios that can only be described as counterproductive.

For instance, in a decision remarkable for its near absence of nuance, Kitchen Prov. Ct. J. held in *R. v. Kapp* that the *Aboriginal Communal Fishing Licences Regulations*<sup>2</sup> and the Communal Licence issued to the Musqueam, Burrard, and Tsawwassen First Nations thereunder infringed the *Charter* rights of non-Aboriginal fishers on grounds “analogous to race.”<sup>3</sup> He found this portion of the federal Aboriginal Fishing Strategy to be “offensive” and, likening it to the “many shameful examples of legislated racial discrimination” from our past, stayed all charges against the accused.<sup>4</sup> At issue in the *Kapp* case were charges brought under the *Fisheries Act*<sup>5</sup> against a number of non-Aboriginal persons who engaged in a protest fishery during a 24-hour period when the fishery was closed to all but persons designated under the Communal Licence. The accused persons raised the *Charter* in their defence, claiming that they were the victims of discrimination. In adjudicating this issue, Judge Kitchen relied upon the registration provisions in the *Indian Act*<sup>6</sup> to characterise the three First Nations, purely and simply, as a group of individuals linked by a “bloodline connection.” Judge Kitchen engaged in no analysis of Aboriginal peoplehood; in essence, he proceeded as if there were Aboriginal

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<sup>2</sup> S.O.R./93-332.

<sup>3</sup> *R. v. Kapp*, 2003 BCPC 279, [2003] 4 C.N.L.R. 238, rev'd (2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958, leave to appeal to B.C. C.A. granted (2004), 205 B.C.A.C. 71, 2004 BCCA 568. The Court of Appeal heard oral argument in the *Kapp* appeal during the week of 5 December 2005. See Petti Fong, “Native groups contest candidate” *The Globe and Mail*, B.C. ed. (6 December 2005) S1.

<sup>4</sup> *Ibid.* at paras. 234, 235.

<sup>5</sup> R.S.C. 1985, c. F-14.

<sup>6</sup> *Supra* c. 1, note 4, ss. 6 and 7.

persons, but no Aboriginal *peoples*.<sup>7</sup> The court perpetuated the antagonism underlying the events by confirming suspicions that the issue was merely one of “racial preference.”

Efforts at recognising and affirming s. 35 rights are bound to expose tensions between Aboriginal and non-Aboriginal claims over access to and usage of scarce resources: there are material interests at stake in the conciliation of these interests and, just as often, conflicting views on entitlement. Canadians—Aboriginal and non-Aboriginal—are certainly free (indeed, should be positively encouraged) to express their various opinions as to how the resulting relationship ought to be structured, but if the process is to be constructive, discussion must occur in a tenor and manner respectful of the parties involved and matters at stake. By passing off Aboriginal rights as “racial” privileges, *Kapp* and like cases represent large steps backward in the journey towards a more harmonious *modus vivendi*.<sup>8</sup>

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<sup>7</sup> This oversight might be chalked up to ignorance. But one must wonder whether something more sinister was not at play. Judge Kitchen’s failure to consider Aboriginal peoplehood begins to border on the ridiculous when one considers his discussion of the claimant group for the purposes of the s. 15 analysis. After summarising the testimony on this issue, he wrote (at para. 148):

That concludes the evidence of the defence witnesses giving evidence as members of the group claiming discrimination. They were as diverse in ancestry, background, involvement in their employment, and political persuasion as much as any group. But I conclude they had one very important thing in common – a sincere commitment to their involvement in the West Coast fishery. This commitment is the bond that holds together the commercial fishing community.

Sadly, one can hardly avoid being struck by the differential treatment the judge accorded the non-Aboriginal and Aboriginal parties to the case. It is noteworthy as well that, although the trial decision in *Kapp* was overturned on appeal, Brennan C.J.B.C.S.C. essentially left this portion of the trial judgment intact: he accepted (*supra* note 3 at para.70 (B.C.L.R.)) that the licence scheme “clearly draws: ‘... a formal distinction between the claimant and others on the basis of one or more personal characteristics ...’ [and] also subjects the claimant group to: ‘... differential treatment on the basis of one or more of the enumerated and analogous grounds.’” Chief Justice Brennan’s *ratio* (*ibid.* at paras. 71-115) was that the scheme did not constitute discrimination under the third prong of the s. 15 test in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1. See also André Goldenberg, “‘Salmon for Peanut Butter’: Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights” (2004) 3 *Indig. L.J.* 61; Gary Oakes, “Judge finds Aboriginals-only salmon fishery ‘grossly unfair’” *The Lawyers Weekly* (15 August 2003) 18.

<sup>8</sup> It should not be suggested that *Kapp* is unique in this regard. In a number of other cases in the “modern era” (*i.e.* post-1982), courts have implied that Aboriginal rights rest upon an antiquated notion of racial difference. Muldoon J.’s original reasons in *Sawridge, supra* c. II, note 47, since reversed, provide a

Doubtless, ancestry may play a role—even a substantial role—in binding individuals to groups that are fundamental to their identity, but it is only one factor and it is not truly a requisite one. That is, it may be a sufficient “connector” in a given case, but it is not by definition *necessary*. To the extent that the Supreme Court decision in *Powley* imposes ancestral connection as a condition precedent to a successful claim of Métis rights, it reflects an essentialised version of Aboriginal society that cannot assist in fulfilling the promise of s. 35.<sup>9</sup> These comments apply *a fortiori* to the extent that the decision might be taken to impose the same criterion for s. 35 rights generally.

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As a corollary, it ought to be recognised that Aboriginal peoples holding site-specific s. 35 rights have the ability to determine which individuals may exercise those rights. Where a member of a Treaty 9 nation marries into, lives within, and is accepted by a Treaty 3 nation, non-Aboriginal Canada should accept his ability to exercise the Treaty 3 hunting rights.<sup>10</sup> Likewise, it should accept that a Mohawk of Akwesasne who is customarily accepted as a member by the Stó:lo Nation in B.C.’s Fraser Valley, who lives

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striking example, wherein the court variously classed the law pertaining to Aboriginal peoples as “revisionist,” “racist,” and promoting “eternal dependence with apartheid.” See also *Apsit v. Manitoba (Human Rights Commission)* (1987), 50 Man.R. (2d) 92, [1988] 1 W.W.R. 629 (Q.B.), rev’d (1988), 55 Man.R. (2d) 263, [1989] 1 W.W.R. 481 (C.A.); *R. v. Cummins*, [1998] B.C.J. No. 125 (QL), [1998] 2 C.N.L.R. 108 (Prov. Ct.); *R. v. Huovinen*, [1998] B.C.J. No. 2064 (QL) (Prov. Ct.), rev’d (1999), 179 D.L.R. (4th) 567, [1999] B.C.J. No. 2130 (QL) (S.C.), rev’d (2000), 188 D.L.R. (4th) 28, 2000 BCCA 427, leave to appeal to S.C.C. refused [2001] 1 S.C.R. xii. This has led to a proliferation of equality-based claims, invoked in both the civil and criminal contexts, on behalf of non-Aboriginal persons against differential treatment for Aboriginal peoples: e.g. *R. v. Willocks* (1992), 14 C.R.R. (2d) 373, [1994] 1 C.N.L.R. 167 (Ont. Ct. J. (Prov. Div.), per Vaillancourt Prov. Ct. J.), aff’d (1995), 22 O.R. (3d) 552, 37 C.R. (4th) 131 (Gen. Div.); *Alford v. Canada (A.G.)* (1997), 31 B.C.L.R. (3d) 228, [1997] B.C.J. No. 251 (QL) (S.C.), aff’d [1998] B.C.J. No. 2965 (QL) (C.A.); *Campbell v. British Columbia (A.G.)*, *supra* c. II, note 41; *Hardy v. Westbank First Nation*, [2003] B.C.J. No. 2540 (QL), 2003 BCSC 878. It is, in my view, entirely counterproductive for both parties to Aboriginal/non-Aboriginal relations to engage in debate under this sort of framework, which tends towards gross over-simplifications and knee-jerk emotion.

<sup>9</sup> *Powley* (S.C.C.), *supra* c. I, note 54. See also discussion above, c. I at 12-14.

<sup>10</sup> *R. v. Meshake* (2002), 58 O.R. (3d) 779, 54 W.C.B. (2d) 153 (Ct. J. (J.P.)), rev’d *infra* note 11.

within the Stó:lo community, and who actively participates in that community might exercise Stó:lo Aboriginal rights.<sup>11</sup> The body of existing case law that would deny these results, or require the claimants to meet the difficult burden of proving that there existed between the relevant peoples a practice of “naturalisation” at the time of European contact,<sup>12</sup> would effectively mark that person for life as a member of the people into which he or she was born. It would force a difficult dilemma upon “inter-people” couples. And, what would be equally problematic, it might operate as a practical encouragement towards endogamy, the long-term sustainability of which would be wanting.

Consider briefly the instrument of the treaty. From earliest instances of European/indigenous diplomacy, the treaty functioned as an agreement between the respective societies. Moreover, “[t]he hallmark of a treaty is the fact that it deals with the

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<sup>11</sup> This was the precise issue in *R. v. Jacobs*, [1998] B.C.J. No. 3144 (QL), [1999] 3 C.N.L.R. 239 (S.C.). In that case, Macaulay J. held against the claimant, Jacobs, on the ground that the evidence was insufficient “to establish individual entitlements to the benefit of Stó:lo constitutionally entrenched rights” (*ibid.* at para. 126). Macaulay J. also rejected the rights claims of co-accused persons Gregory (a Mi’kmaq from Nova Scotia who lived in the region, had close connections with and participated in the First Nation), Connal (a non-Aboriginal person who was raised on a Stó:lo reserve, was married to a Band member with whom he had two sons—both of whom were also Band members—and was accepted by the Stó:lo as one of their own), and Flamand (a Peigan person from Alberta who for a time lived on a Stó:lo reserve and who participated actively in the Stó:lo community and ceremonial life).

<sup>12</sup> This was effectively the position of the court that heard and allowed the appeal from *R. v. Meshake*, *supra* note 9: see [2003] 2 C.N.L.R. 252, 56 W.C.B. (2d) 470 (Ont. Ct. J.). For other cases that would deny the right to acquire membership in a different treaty nation (and, hence, different treaty rights) see: *R. v. Naponse*, *supra* c. 1, note 65; *R. v. Shipman* (2004), 62 W.C.B. (2d) 66, 2004 ONCJ 51 (J.P.), *aff’d* [2005] O.J. No. 4247 (QL) (Ct. J.). On the other hand, while the court in *R. v. Nadon*, [1999] O.J. No. 5429 (C.J. (J.P.)) suggested that a member of a Treaty Nine First Nation could effectively “transfer” his membership to a Robinson-Superior Treaty First Nation and thereby obtain rights under the latter treaty, it placed emphasis on the fact that, at the time of the alleged offences, the accused had not yet completed any official transfer recognised by INAC (although he had been living in the Robinson-Superior territory for some time prior). In my view, these cases are wrongly decided. While it is uncontroversial to state that a person can only claim the treaty rights of the people in which he or she is a member (*R. v. Wesley* (1975), 9 O.R. (2d) 524, 62 D.L.R. (3d) 305 (Dist. Ct.); *R. v. Syrette*, [1989] O.J. No. 3157 (QL) (Prov. Ct. (Crim. Div.)); *R. v. Wolfe*, [1997] B.C.J. No. 3127 (QL) (S.C.), *rev’g* (1996), [1997] 1 C.N.L.R. 171, [1996] B.C.J. No. 1738 (QL) (Prov. Ct.); *R. v. Traverse* (2004), 242 Sask.R. 161, 2004 SKPC 14, *aff’d* (2005), 259 Sask.R. 97, 2005 SKQB 22, *sentence appeal allowed* 2005 SKCA 96, [2005] S.J. No. 496 (QL)), it is quite another thing to say that that person cannot, by virtue of his or her life decisions, “emigrate” from one people to another—without the intercession of the federal government.

rights of the whole nation concerned.”<sup>13</sup> Why should it be that the successor of the European side of these bargains—all of modern non-Aboriginal Canada—is permitted to naturalise members while the successor to the indigenous side—today’s Aboriginal peoples—is not? Intuitively, this makes little sense. For instance, to make use of personal example, I was born in Edmonton, Alberta, which is situated on lands that were the subject of Treaty 6 in 1876. At the time the Treaty was concluded, none of my ancestors were yet in the area and, in fact, none even lived in Canada. Yet when I was born, I was automatically entitled, as a subject of the Crown, to benefit from the then nearly 100-year-old Treaty. Why could I do so? Simply, because Canadian citizenship is not an heirloom: the State grants it to persons it deems worthy, in accordance with its naturalisation laws.

Indeed, Canada has long recognised that naturalisation of new citizens is necessary for its prosperity and longevity: the families of my paternal grandparents were enticed in the early 20th century to leave their ancestral home in the Netherlands in order to “populate the West” and farm land in the Edmonton area; Quebec has for quite some time sought immigrants to bolster the Francophone aspect of its society in the face of an extremely low birth rate amongst persons actually born there. Politicians, business leaders, and the media are constantly stressing the importance of Canada’s attracting skilled immigrants. Why should Canadians have a difficulty, then, in recognising that other societies—in this case, First Nations—might find it advisable, or even necessary, at times to accept “others” into the community? Ignoring—or, worse, negating—this

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<sup>13</sup> Sébastien Grammond, “Aboriginal Treaties and Canadian Law” (1994) 20 *Queen’s L.J.* 57 at 61.

possibility in the indigenous context creates an unjustifiable, paternalistic fetter upon Aboriginal peoplehood.

In my opinion, any approach that would put the onus on Aboriginal peoples to adduce evidence that their forebears observed a given naturalisation practice or custom is one that literally begins from a presumption of “frozen rights.” The better view is to respect Aboriginal peoples as *peoples*, accepting that a necessary incident of peoplehood is its fluidity. As a society, Canada must not allow “red herrings” such as the concern that Aboriginal peoples will grant membership to a host of new individuals, thus taxing already scarce resources, to deter it from making this recognition.<sup>14</sup> Aboriginal and non-Aboriginal peoples doubtless have a joint interest in conservation of land and resources, and any tensions that might initially be caused by individuals being accepted as members of Aboriginal peoples can be combated through efforts at civic education, to assist the

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<sup>14</sup> In *Chevrier*, *supra* c. III, note 7 at 130-31, after holding that a “mixed-blood” descendant of a Robinson Treaty signatory (who was not recognised under the *Indian Act*, *supra* note 5) had inherited the treaty right to hunt, Justice Wright took pains to state:

To those who are concerned that this decision may lead to the destruction of our wildlife resources I can only say:

1. This decision will not lead to unrestricted hunting by everyone claiming to have an Indian ancestor because relatively few, other than status Indians, will be able to prove their descent from a signatory tribe,
2. The whites who rely upon these resources must do so recognizing that these resources have come to them subject to prior claims,
3. Although Provincial law cannot negate these treaty rights the Federal government may still retain the power to regulate the exercise of these rights for the good of everyone,
4. In the final analysis, everyone with a legitimate interest in the continuation of our wildlife resources must agree upon the proper management of these resources. If this is not done we may see animals such as the moose melt from our forests as has the woodland caribou.

I would echo this sentiment in respect of another concern that one sometimes hears voiced, particularly in the *Indian Act* context: namely, that increased numbers of recognised Aboriginal persons will lead to increased fiscal burdens on the federal government. Amongst other things, this unjustifiably and wrongfully presumes that the Aboriginal peoples are unwilling or unable to seek self-sufficiency, and ignores the fact that with increased numbers come increased strains on the Aboriginal community’s resources as well (such that recognising that Aboriginal peoples may control their own membership would not create an incentive towards unrestrained growth).

public in understanding the issues and values at play. In any event, our approach to this issue should surely not be determined by *ex ante* and uninformed presumptions that the Aboriginal peoples will exercise their power in error. If anything, communities that have shown such strength and resilience in the face of prolonged assimilatory efforts are liable to be extremely judicious in selecting only members who can demonstrate some commitment to the indigenous social order. Thus, the inter-societal nature of Aboriginal rights would be maintained.

The more difficult question in my opinion is whether Canadian law ought to recognise any fetters on an Aboriginal community's ability to deny membership. In other words, ought there to be cases in which a lack of explicit community acceptance might be overlooked, such that an individual who self-identifies as a member of a recognised Aboriginal people might benefit from s. 35 rights regardless? Tentatively, I would suggest that the answer should be affirmative, for the following reasons.

One can hypothesise about scenarios in which an individual Aboriginal rights claimant's inability to prove acceptance by the modern community should not necessarily be controlling of whether, for example, conservation officers determine to charge—or a court determines to convict—him or her. One instance would be where internal division within a people has led to involuntary estrangement or ostracism. Another might be where prolonged geographical dislocation occurs,<sup>15</sup> prompting the group to cease recognising the person as a member, but where in fact the person's subjective connection to the community remains strong. This would not “force” members upon a community,

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<sup>15</sup> For example, testifying at the *Powley* trial, Art Bennett reported how he had moved around a lot as an adult, including spending some substantial time abroad: *Powley* Transcript, vol. 1 (29 April 1998) at 279 (Art Bennett examination-in-chief). On geographic dislocation generally, see also *Lavigne, supra* c. III, note 36.

but it would permit persons who strongly self-identify with the people in question—and who appear to have the same subjective connection to the Aboriginal normative order as indicates the presence of the people to begin with—to continue their connection with the social values that they hold dear, and that serve to define their relationship to the world around them.

The point is not to be exhaustive at this stage, but rather to suggest that situations may arise in which the preferable solution requires some flexibility in applying the “dual criteria” of self-identification and group acceptance. There may be benefits, therefore, in avoiding too categorical a pronouncement on the necessity of both criteria in each and every case.

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Finally, presuming for the purposes of this section that community acceptance is established, what relevance is there to the stage in life at which an individual begins to perceive him or herself as an Aboriginal person? At the risk of sounding overly glib, I would suggest that this factor is largely irrelevant. The testimony of Art Bennett and Jack Bouchard at the *Powley* trial was compelling as to their commitment to life as Métis persons, and yet they had both—like Steve Powley himself—only begun exploring their Métis ancestry long after reaching adulthood. This did not in any way reflect a lesser commitment on their parts to life as a member of a Métis community, nor that “Métisness” was a lesser part of their identities.

This sort of cultural re-attachment may be particularly acute amongst Métis persons in areas distant from the Métis Nation heartland on the Canadian Prairies, but it certainly exists as well with First Nations persons. First, there is the obvious fact of the *Indian Act*,

which has split historical communities and resulted in the current situation of political representation.<sup>16</sup> Through the operation of the legislation's "status" rules, a person's ancestors may have lost their connection with the reserve community; such person may only discover evidence of—and take an abiding interest in—his or her Aboriginal ancestry at a relatively later date. Likewise, the legacy of such regrettable policies as the "Sixties Scoop"<sup>17</sup> and the residential schools<sup>18</sup> is that there are many persons who are only fully able to explore their Aboriginal roots later in life. Holding too resolutely to *Powley*'s requirement that self-identification "not be of recent vintage"<sup>19</sup> would have unintended consequences for these persons.

Moreover, the recentness of a person's self-identification tells very little about his or her actual commitment to life as an Aboriginal person. Arguably, a person who makes such a weighty decision later in life—who feels impelled to connect with an Aboriginal society—might show an exceptionally strong connection to the Aboriginal customs and values that serve to undergird the doctrine of Aboriginal rights.

In the final analysis, evidence of when a person began self-identifying as an Aboriginal person is a poor substitute for a more contextualised and subjective-based test focussed on the elements of peoplehood that sustain the doctrine of Aboriginal rights. It is to this topic that I now return, in order to bring the above analysis to bear on the actual content of the rights protected in s. 35.

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<sup>16</sup> Nationally, the AFN represents leadership of *Indian Act* bands, the CAP represents First Nations persons that live off-reserve, and the NWAC specifically represents Aboriginal women.

<sup>17</sup> The "Sixties Scoop," describing the placement of Aboriginal children in the care of non-Aboriginal families, is discussed in Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol. 3 (Ottawa: Communication Group, 1996) at 24-25.

<sup>18</sup> See *RCAP Looking Forward Looking Back*, *supra* c. 1, note 72 at 333-409.

<sup>19</sup> See *supra* c. 1, note 62 and accompanying text.

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Chief Justice Lamer's judgment in *Van der Peet*<sup>20</sup> commences with a citation to the Court's familiar instruction to approach constitutional provisions in light of the interests they were meant to protect, stating:

In order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible.<sup>21</sup>

With this methodology clear, Lamer C.J.C. made two initial observations. First, he held, "[s]ection 35(1), it is true, recognizes and affirms existing aboriginal *rights*, but it must not be forgotten that the rights it recognizes and affirms are *aboriginal*."<sup>22</sup> Following this, he offered that Aboriginal rights "arise from the fact that aboriginal people are *aboriginal*."<sup>23</sup> Expanding his analysis on this point, the Chief Justice cited a number of well-known authorities for the principle that:

... the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.<sup>24</sup>

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<sup>20</sup> *Van der Peet*, *supra* c.1, note 28.

<sup>21</sup> *Ibid.* at para. 3, citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344, 60 A.R. 161.

<sup>22</sup> *Van der Peet*, *ibid.* at para. 17, *per* Lamer C.J.C. [emphasis in original].

<sup>23</sup> *Ibid.* at para. 19, *per* Lamer C.J.C. [emphasis in original]. Again, in Lamer C.J.C.'s own words (at para. 20 [emphasis in original]): "The Court must define the scope of s. 35(1) in a way which captures *both* the aboriginal and the rights in aboriginal rights."

<sup>24</sup> *Ibid.* at para. 30, *per* Lamer C.J.C. [emphasis in original]. The authorities cited were (at paras. 32-42): the text of s. 35(1) of the *Constitution Act, 1982*, *supra* c. 1, note 13; *Calder*, *supra* c. II, note 15; *Guerin*, *supra* c. II, note 26; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823); *Worcester v. Georgia*, *supra* c. II, note 15; *Mabo (No. 2)*, *supra* c. II, note 15; David Elliott, *Law and Aboriginal Peoples of Canada*, 2d ed. (North York, ON: Captus Press, 1994); Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L.J. 173; Pentney, *supra* c. III, (cont'd)

The remainder of the Chief Justice's reasons, I suggest, are best understood as an attempt to place a definition on the term "Aboriginal," and to craft an approach to s. 35 in which all that falls outside the set of presumed Aboriginal characteristics also falls outside of constitutional protection.<sup>25</sup> That is, his conclusion as to the appropriate test for proving an Aboriginal right, and his elaboration of some ten factors to be considered in application of the test, were but incidents of the initial determination that s. 35 protects some core of "Aboriginality." The culmination of all this was the Chief Justice's declaration that, "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,"<sup>26</sup> these practices, customs, and traditions requiring continuity with those that existed "prior to contact between aboriginal and European societies."<sup>27</sup>

Much has been written regarding the weaknesses in the Court's approach in *Van der Peet*.<sup>28</sup> In my view, however, the primary error in Chief Justice Lamer's methodology is that he failed to consider that Aboriginal rights in fact arise from the fact that aboriginal peoples are *peoples*. Had he done so, the current state of the law would look quite

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note 1; "B.I.C.L.", *supra* c. II, note 20; "Legal Basis", *supra* c. II, note 26; "Understanding", *supra* c. I, note 52.

<sup>25</sup> See also Borrows' critique of *Van der Peet* in *Recovering Canada*, *supra* c. II, note 15 at 56ff.

<sup>26</sup> *Van der Peet*, *supra* note 19 at para. 46, *per* Lamer C.J.C. Over the course of his reasons, the Chief Justice begins to use the word "distinctive" not in reference to the culture of the aboriginal society under consideration, but rather in reference to the specific constituent practices, customs, and traditions (*e.g.* para. 71). Thus, his conception of aboriginal rights is further narrowed: not only must the particular practice, custom or tradition be integral to the distinctive aboriginal culture, but it must be "a central and significant part" of the culture (para. 55), and distinctive unto itself. It must be "one of the things that truly made the society what it was." (*Ibid.* [emphasis in original]. See also para. 71.)

<sup>27</sup> *Ibid.* at para. 60, *per* Lamer C.J.C.

<sup>28</sup> See *e.g.* Barsh & Henderson, *supra* c. III, note 65; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 *Am. Indian L. Rev.* 37; Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 *Constitutional Forum* 28; Chilwin Chienhan Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997) 52 *U.T. Fac. L. Rev.* 419; Anna Zalewski, "From *Sparrow* to *Van der Peet*: Evolution of a Definition of Aboriginal Rights" (1997) 55 *U.T. Fac. L. Rev.* 435.

different: the concept of Aboriginal right would be more robust, and arguably more suited to reconciliation—a long-term relationship between Aboriginal and non-Aboriginal societies. Claimants could avoid the pitfalls inherent in the courts' characterisation exercise,<sup>29</sup> and rights would fall to be determined on the more defensible ground of whether there was a genuine conflict between Aboriginal and non-Aboriginal legal orders—one that required resort to the *sui generis* body of inter-societal law for its resolution.

An approach to Aboriginal rights centred on peoplehood would have an ancillary benefit as well, in that it would effect the least imposition on the peoples themselves. For example, subsequent to *Van der Peet*, Aboriginal rights claimants must frame their demands in terms of “practices, customs, and traditions.” Over time, this can have a real effect on the communities themselves, as individuals attempt to tailor their behaviour in a way that will be most cognisable to the governing legal *régime*. This can work a sort of inversion, whereby the formerly un-stated bonds of community become consciously expressed in terms of the legal test, and in a way that may be imperceptible in its effects on daily life, but that will have a distorting effect over time.<sup>30</sup> To some degree, *Powley* provides an illustration of this phenomenon: counsel for Steve Powley, to a large degree, relied upon evidence of specific hunting practices, etc. as evidencing the Sault Ste. Marie Métis community. While in fact hunting may be of great importance to the Métis community, there is a risk that—by maintaining a system of Aboriginal rights in which

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<sup>29</sup> In cases such as *R. v. Pamajewon*, [1996] 2 S.C.R. 821, 199 N.R. 321 and *Mitchell v. M.N.R.*, *supra* c. II, note 15, the Court defined the claimed rights in a specificity that was virtually guaranteed to kill the claims prior even to their consideration.

<sup>30</sup> The work of Val Napoleon makes a particular contribution on this point: see *e.g. supra* c. II, note 15.

only distinctive practices, customs, and traditions receive protection—the communities themselves may be pared down to reflect only the stark differences between Aboriginal and non-Aboriginal society. So doing, the everyday but all-important community connections that may not appear as objectively “distinctive” may fade into the background.

Aboriginal rights, after all, are about much more than the preservation of cultural customs as a device to encourage individual or collective flourishing. They are the means by which the peoples who arrived in Canada over the course of the past 500 years relate to and interact with the peoples who were already there. The doctrine provides a process towards inter-societal accommodation. Canadian society must recognise the doctrine as nothing less than an imperative—as the vehicle through which an accommodating future with the first peoples is to be achieved.

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